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A

CONCISE TREATISE

ON THE

CONSTRUCTION OF WILLS.

T. Radford Potts
Inner Temple

A

CONCISE TREATISE
ON THE
CONSTRUCTION OF WILLS.

BY

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PREFACE.

THE fact that the last comprehensive treatise on the Construction of Wills is now fifteen years old, might alone be a sufficient justification of a new work on the subject. Whether it is a sufficient justification of the work now offered to the profession, experience alone can show. My object has been to produce something more compendious than Jarman's classical work—the scheme of which, involving the statement of cases at length, would now be very cumbersome, in consequence of the large accumulation of cases since the last edition of his work; and on the other hand, something more detailed and elaborate than Mr. Vaughan Hawkins' useful little book. I may say at once that without Jarman's book, my own would probably never have been written. But I have throughout used his work rather as a guide than a key to the authorities. In details I have consulted Mr. Vaughan Hawkins only incidentally, though the general scheme of his book has served in the main as the model for my own.

The value of authority in questions of testamentary construction has so frequently been called in question

of late, that it may perhaps be allowable to say a few words as to the point of view from which the present work has been written.

No two wills are alike, it is said ; it is therefore useless to cite a decision upon one will as governing the interpretation of another ; one man's " nonsense " affords no clue to the meaning of another man's " nonsense."

Such expressions as these are very natural, and as a protest against hard and fast rules of construction, very valuable. The stream of English law is so continuous, and the mass of reported decisions so enormous, that very few points arise in practice upon which it is not possible to cite some more or less appropriate authority. Counsel, in their anxiety to omit nothing which may support their clients' interests, overlay their argument with cases, the majority of which have no more than a superficial resemblance to the point in question. It is no wonder that judges, wearied with the citation of irrelevant cases, have sometimes gone so far as to object to the citation of cases upon the construction of wills altogether. And often the argument from authority is carried further. It is contended that there is some hard and fast rule which is to be applied regardless of the words of the will and the intention of the testator. The assumption of rules of construction in this sense is an almost unmixed evil. It tends to divorce law from common sense, and to reduce it to a set of technicalities which none but the initiated can understand. Unfortunately this point of view has not been without its influence upon English law. The

most striking instance of it is perhaps the doctrine of general and particular intention. As now interpreted in the sense that technical words must have their legal effect, this doctrine would be identical with the modern doctrine that a testator must mean what he has said, were it not for the survival of the older doctrine in the so-called rule in Shelley's case. In this application of it, the rule is not simply that technical words must have their legal effect, but that technical words must have their effect notwithstanding the strongest and clearest expression of intention on the part of the testator short of an express interpretation clause, that the words were not used technically. That a devise to a man for life with remainder to his heirs should give the ancestor the immediate fee, must always remain incomprehensible to common sense, however satisfactorily the learned may be able to trace the origin of the rule in a state of things long gone by. The rule in Shelley's case is in fact a disgrace to the rational spirit of English law, and it is to be hoped that it may soon be abolished by the Legislature as it has long since been in America.

Another and more recent instance of an attempt to establish hard and fast rules of construction may be found in the rules laid down in *Edwards v. Edwards*. In all probability Lord Romilly only intended those rules to be convenient heads for arranging decided cases, and so far as they accurately extracted the *ratio decidendi* of those cases, they were very valuable. But, in course of time, they came to have a value independently of the cases upon which they were based,

and there can be no doubt that the so-called fourth rule which was laid down in terms more general than decided cases justified, came to be applied to new cases *ab extra* without much consideration of the language of the particular testator. The consequence was the sacrifice of the wishes of the individual to the certainty of the law ; and had not a decision of the House of Lords intervened to reduce the rule within its proper limits, there would have been another instance of language meaning one thing to a layman and a totally different thing to a lawyer.

So far then it may be said there are no rules of construction but only decided cases. A testator can only mean what he has said, and his meaning is to be gathered by a careful study of the language he has used. On the other hand, admitting all this, it does not therefore follow that the construction of a will is to be left entirely to the discretion of the individual judge, unfettered by precedent or authority, though occasional dicta of judges might be cited in support of such a position.

The principles of law applicable to the construction of wills must be the same as those applicable to other matters.

Law is no more than the expression of the meaning of the acts of men in their relations with one another, when viewed by the most enlightened common sense of the day. There is no abstract law to be applied like a foot rule to facts ; but law is the facts viewed in their natural bearings with reference to each other. It follows that, if the facts are the same, the same consequences ought to

be deduced from them. The difficulty consists in discovering whether the facts are the same or not. In one sense, no doubt, the facts never are absolutely identical. There must at least be a difference of time, and this in itself, considering the continuous change in social life, is an important factor. But the question is not whether the facts are absolutely identical, but whether a fresh set of facts can be fairly distinguished from an earlier set. If not, judges have always considered themselves bound by the interpretation put upon such facts by their predecessors ; and when there have been repeated adjudications upon similar sets of facts, by a process of analysis and classification, rejecting immaterial distinctions and selecting essential points of similarity, what may be called a rule of law is established. But rules of law in this sense as distinguished from rules of policy, or from rules of law established by legislative enactment, only mean that the Courts have taken a particular view of a certain set of facts, and will do so again if similar facts arise. This process is inevitably subject to a twofold danger ; a strong judge will be more likely to distinguish cases, he will look upon precedent as a guide and not as a master. A judge of a less independent spirit will dwell more upon resemblances, he will be more anxious to shelter himself under authority. The inclination of the one to adapt the law to the changing conditions of life has the accompanying disadvantage of unsettling it, while the other tends to make the law antiquated, though he leaves it certain.

No doubt in the case of wills there is this dis-

tion. The facts here are the words employed by the testator, and since language is a much more adequate instrument for conveying subtleties of meaning than any other form of expression, the facts are of necessity exceedingly complex. It is more unlikely that undistinguishable sets of facts have already been adjudicated upon in the case of wills than in any other branch of law ; but if they have been the subject of decision, a Court of co-ordinate jurisdiction is as much bound by those decisions in the cases of wills as in any other branch of law. The frequent dicta, therefore, to be found in the reports against citing cases upon the construction of wills only come to this, that it is useless to cite cases which have no application, and that in all probability the cases cited will be found to have none. Even with regard to this latter point it will not be safe to be too confident. Cases of construction are so numerous, originality even in "nonsense" is so rare, that there will nearly always be similar cases, or, at any rate, cases instructive even by their distinguishability.

The present work has been written from the point of view which I have thus endeavoured to indicate. Wherever rules of construction are spoken of in the following pages, the meaning is, that certain words have received a particular interpretation by the Courts, and that words not reasonably distinguishable will receive the same interpretation when they occur again, or, in other words, that certain rules of construction will prevail in the absence of an intention to the contrary. The rules of construction here discussed are,

in fact, no more than a collection of arguments for or against the different constructions which may suggest themselves in the interpretation of the meaning of testators.

November, 1876.

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ADDENDA ET CORRIGENDA.

- Page 18, line 4 from top, add "cap. 4" after 43 Eliz.
,, 34, line 15 from top, *read* 102 *instead of* 101.
,, 65, line 11 from bottom, *add* *Mannox v. Greener*, 14 Eq. 456.
,, 69, line 6 from top, *read* *interests for interest*.
,, 73, line 19 from top, *dele* dashes before and after leaseholds.
,, 76, line 4 from bottom, *add reference* 3 Ch. D. 156.
,, 76, line 2 from bottom, *read* *Cantley for Cantley*.
,, 88, line 5 from bottom, *read* *Davis for Davies*.
,, 89, line 7 from top, *read* *Gover for Gower*.
,, 121, line 19 from top, *read* *Skelmersdale for Shelmersdale*.
,, 128, line 9 from top, *read* *Clifton for Clitfon*.
,, 128, line 12 from top, *read* *legitimate for illegitimate*.
,, 143, line 4 from bottom, *read* *Purton for Parton*.
,, 144, line 14 from bottom, *read* *Gray for Graw*.
,, 158, line 17 from bottom, *read* *Lynam for Lyman*.
,, 193, line 32 from bottom, *add after* *Ashton v. Lord Langdale*, 4 De G.
 & S. 402, *a reference to* *Holdsworth v. Davenport*, 3 Ch. D. 185.
,, 197, line 12 from bottom, *read* *Clitheroe for Citheroe*.
,, 211, line 10 from top, *read* *Bunbury for Banbury*.
,, 219, line 10 from bottom, *read* *Leonard for Leonards*.
,, 233, line 2 from top, *read* *Attwood for Atwood*.
,, 242, line 5 from bottom, *read* *Lacy for Lucy*.
,, 254, line 1 from bottom, *add reference to* *Gott v. Nairne*, 3 Ch. D. 278.
,, 257, line 6 from top, *add reference to* *Evans v. Walker*, 3 Ch. D. 211.
,, 296, line 14 from bottom, *add reference to* *Evans v. Walker*, *supra*.
,, 318, line 9 from bottom, *add reference to* 3 Ch. D. 285.
,, 319, line 2 from top, *add reference to* 3 Ch. D. 148.
,, 330, line 6 from bottom, *read* *Paylor for Taylor*.

A CONCISE TREATISE ON WILLS.

CHAPTER I.

INCORPORATION OF DOCUMENTS.

THE formalities necessary to constitute a valid will are laid down in the 9th section of the Wills Act, 1 Vict. c. 26. It is not proposed here to consider the points with regard to execution, attestation, and revocation arising upon this and other sections of the Act. It may, however, be noticed that any papers in existence at the time of execution of a testamentary paper, and described as then existing, may be incorporated into it, if so clearly referred to as to leave no doubt what papers were intended. *Hutchings v. Wood*, 2 Moo. P. C. 355; *Aaron v. Aaron*, 3 De G. & S. 475. *In the goods of Sunderland*, L. R. 1 P. & D. 198; *In the goods of Mercer*, L. R. 2 P. & D. 91; see *In the goods of Pascal*, 1 P. & D. 606; *In the goods of Gill*, L. R. 2 P. & D. 6; *Quihampton v. Going*, 24 W. R. 917.

Incorporation by reference.

Thus a reference by a duly attested codicil to a will incorporates the will, if there is only one document in existence to which the term "will" can apply. *Barnes v. Crowe*, 1 Ves. Jr. 485; *Doe d. Williams v. Evans*, 1 Cr. & Mee. 42; *Allen v. Maddock*, 11 Moo. P. C. 427.

Reference to a will in a codicil incorporates an unattested will.

Reference
to unat-
tested
codicil.

Similarly a reference in a codicil to a prior unattested codicil will incorporate it. *Ingoldby v. Ingoldby*, 4 N. of C. 493 ; *Smith's case*, 2 Curt. 796.

Reference
to a will
where
there is a
valid will
and codi-
cils will
not incor-
porate un-
attested
codicils.

A reference, however, in a codicil to a will and prior codicils, where there is a will and codicils duly attested, will not incorporate a codicil not duly attested. *Croker v. Marquis of Hertford*, 3 Curt. 468, 4 Moo. P. C. 339.

Reference
to will
where
there is a
valid will
and un-
attested
codicils.

And upon the same principle it would seem that a reference by a codicil to a will where there is a duly attested will and some unattested codicils will not set up the unattested codicils. *Utterton v. Robins*, 1 Ad. & E. 423, 2 Nev. & M. 821 ; *In the goods of Phelps*, 6 N. of C. 695 ; *Haynes v. Hill*, 7 N. of C. 256 ; see, however, *Radburn v. Jervis*, 3 B. 450 ; *Guest v. Willasey*, 2 Bing. 429, 3 Bing. 614.

References
to will by
date will
not include
codicils.

A reference to a will incorporates, it seems, all the documents constituting the will, such as a valid will and codicils, but if the will is referred to as of a particular date, the will only of that date, and not subsequent codicils, will be incorporated. *Burton v. Newbery*, 1 Ch. D. 234 ; *Gordon v. Lord Reay*, 5 Sim. 274, would probably not again be followed.

Incorpora-
tion con-
fined to
papers in
existence
at date of
will.

A paper not in existence at the date of the will cannot be incorporated into it. *Countess Ferraris v. Lord Hertford*, 3 Curt. 468 ; *Re Watkins*, L. R. 1 P. & D. 19 ; *In the goods of Dallow, ib.*, 189.

Power
cannot be
reserved by
will of
making a
subsequent
unattested
will.

A testator cannot reserve by his will the power of making a testamentary disposition of his property by a subsequent unattested paper. *Habergham v. Vincent*, 2 Ves. Jr. 204, 4 B. C. C. 353 ; *Countess de Zichy Ferraris v. Marquis of Hertford*, 3 Curt. 468, 4 Moo. P. C. 339 ; but he can make a complete disposition of his property to persons to be ascertained by a subsequent act on his part, provided the act is one which must be done as the natural result of the state of the property at

But what
persons are
to take
under a
particular
description

the date of the will, and is in no way dependent upon a power reserved by the will. *Stubbs v. Sargon*, 2 Kee. 255, 3 M. & Cr. 507, where the gift was to the persons who should be in co-partnership with the testatrix at the time of her decease, or to whom she should have disposed of her business. may depend on a subsequent act of the testator.

CHAPTER II.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

1 Vict.
cap. 26,
s. 8.

By the third section of the Wills Act, it is enacted that every person may, by his will, bequeath or dispose of "all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent of his ancestor, upon his executor or administrator; and that the power thereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates, *pur autre vie*, whether there shall or shall

not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

It appears to be doubtful whether an estate, *pur autre vie*, limited to a man and the heirs of his body could be disposed of before the Wills Act, if the entail had not been barred. The better opinion seems to be that it could not, see *Campbell v. Sandys*, 1 Sch. & Lef. 294; *Hopkins v. Ramage*, Batty, 365; *Blake v. Luxton*, Coop. 185; *Allen v. Allen*, 2 Dr. & War. 307, 326, and see *Doe v. Luxton*, 6 T. R. 293; see 1 Jarman, 56.

Whether an estate *pur autre vie* to a man and the heirs of his body is devisable.

The Wills Act apparently leaves the point where it was, since sec. 3, which makes devisable all real estate which if not devised would devolve upon the heir-at-law, or customary heir, or upon his executor or administrator, does not in terms extend to real estate, which would descend to the heir special, if not devised.

Prior to the Wills Act it was held that a general power to appoint property operating upon the legal estate given to the survivor of two persons could not be exercised till

Power to survivor of two persons to appoint the legal estate.

the survivor was ascertained. *Doe v. Tomkinson*, 2 Mau. S. 165.

This doctrine, however, had no application to equitable estates, and is apparently abolished by the Wills Act. *Thomas v. Jones*, 1 D. J. & S. 63.

Title by possession is devisable.

A person in possession of land without other title has a devisable interest. *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Clarke v. Clarke*, Ir. R. 2 C. L. 395; see *Gresley v. Mousley*, 4 De G. & J. 78.

But not the right to sue in testator's name.

But the third section does not make any kind of personalty bequeathable which could not be bequeathed before, thus a testator cannot bequeath a promissory note made to him so as to pass the right to sue on it which remains in the executor. *Bishop v. Curtis*, 18 Q. B. 879.

Property held in joint tenancy.

Property held by the testator in joint tenancy survives to the other joint tenants and cannot be given by will; thus, for instance, property transferred by the testator into the joint names of himself and his wife where there is nothing to rebut the presumption of advancement cannot be given by will, whether by specific gift or otherwise. *Dummer v. Pitcher*, 2 M. & K. 262; *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97.

Power to be exercised in writing.

A power to be exercised by an instrument in writing could always be exercised by will. *Lisle v. Lisle*, 1 B. C. C. 533.

And a power to be exercised by an instrument in writing executed with certain formalities is exerciseable by will executed with those formalities. *Kibbet v. Lee*, Hob. 312; *Smith v. Adkins*, 14 Eq. 402; *Orange v. Pickford*, 4 Dr. 363.

Sec. 10 of the Wills Act.

By the 10th section of the Wills Act no appointment made by will in exercise of any power shall be valid unless the same be executed in manner thereinbefore required; and every will so executed shall so far as respects the execution and attestation thereof be a valid execution of

a power by appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

The section applies to powers created since as well as to powers created before the Act. *Hubbard v. Lees*, L. R. 1 Ex. 255.

Applies to powers created since the Act.

The section, however, only applies to powers which are in terms testamentary, and therefore a power to appoint by instrument in writing executed with certain formalities cannot be exercised by a will executed only with the statutory formalities. *West v. Ray*, Kay. 385; *Taylor v. Meads*, 4 D. J. & S. 597.

But only to powers testamentary in terms.

It seems clear that when there is a gift to trustees and the survivor of them his heirs and assigns upon trusts to be executed by the trustees and the survivor of them his heirs and assigns, the power of executing the trusts may be devised by the will of the survivor. *Titley v. Wolstenholme*, 7 B. 425; *Hall v. May*, 3 K. & J. 585.

When a trust may be devised.

This, however, is not the case when the gift is to the trustees and the survivor of them and his heirs, or to the trustees and the survivor of them his heirs, executors, or administrators, the word assigns being omitted. *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De. G. & S. 479; *Macdonald v. Walker*, 14 B. 556; *Ashton v. Wood*, 3 Sm. & G. 436; 3 Jur. N. S. 1164.

CHAPTER III.

ELECTION.

When election arises.

A TESTATOR can of course only dispose of his own property by will ; however, by means of the doctrine of election, he may in many cases in effect dispose of the property of others. Thus, where a testator disposes of the property of a person, and at the same time gives that person property of his own by his will, the person whose property is given away is bound to elect whether he will keep his own property and surrender an equivalent value of the benefits given him by the will, or whether he will take entirely under the will.

Legatee must elect for or against the whole instrument, will, and codicils.

He must elect to take under or against the whole instrument, will and codicils, and not merely that part of it which disposes of his own property. *Cooper v. Cooper*, L. R. 6 Ch. 15 ; *ib.* 7 H. L. 58.

Unless the testator limits the election to some particular benefit.

If, however, there is a gift expressly in lieu of dower, or the testator declares that the legatee is to elect only between one of the benefits given him by the will and his own property, election will be confined to that. *Walker v. Inge*, Rom. N. of C. 95 ; *East v. Cook*, 2 Ves. Sen. 80, explained in *Wilkinson v. Dent*, 6 Ch. 339.

Gift in satisfaction of a debt will not limit election to that particular gift.

But a gift, though declared to be in satisfaction of any sums in which the testator may be indebted to the donee at the time of his decease, or in satisfaction of a rent charge, the object being testamentary bounty, will put the legatees to their election to take under or against the

whole will. *Wilkinson v. Dent*, 6 Ch. 339; see, too, *Coutts v. Acworth*, 9 Eq. 519.

Election arises only between a gift by the will and something belonging to the legatee by a title *dehors* the will. Thus, no case for election arises where a testator has given a legatee several legacies some of which are onerous. In such a case the legatee may reject the onerous legacies without forfeiting the others. *Andrew v. Trinity Hall*, 9 Ves. 525; *Maffett v. Bates*, 3 Sm. & G. 468; *Warren v. Rudall*, 1 J. & H. 1; *Aston v. Wood*, 22 W. R. 893.

Election arises only between a title under and a title *dehors* the will.

No election where one of two gifts is onerous.

Though, if the onerous and beneficial legacies are given together as one entire gift, or there is an intention that the legatee shall not take one without the other, he must take all or none. *Green v. Britten*, 42 L. J. Ch. 187; *Talbot v. Lord Radnor*, 3 M. & K. 252; see *Fairtlough v. Johnstone*, 16 Ir. Ch. 442.

Unless there is an intention that the legatee is to take all or none.

And upon the same principle election does not arise as between two clauses in the same will, the title to both the properties between which the legatee would have to elect being derived under the will. *Wollaston v. King*, 8 Eq. 165; *Wallinger v. Wallinger*, 9 Eq. 301.

No election between two clauses of a will.

Devises and bequests upon condition must be distinguished from cases of election. *Cooper v. Cooper*, L. R. 6 Ch. 15; *ib.* 7 H. L. 53. In the latter it is immaterial whether the testator knew or not that the property of which he was disposing was not his own, in the former he must have known that it was not. The characteristic of the former is forfeiture, of the latter compensation. Thus a devise to A. on condition of his conveying certain property of his own would be a condition and not a case for election. *Middleton v. Windross*, 16 Eq. 212, does not recognise the distinction; see *Boughton v. Boughton*, 2 Ves. Sen. 12; *Fearon v. Fearon*, 3 Ir. Ch. 19.

Devise upon condition distinguished from election.

To raise election the testator must actually dispose of something not his own.

In order to raise a case for election there must be on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will.

The intention to dispose of something not his own must appear on the face of the will, and evidence is not admissible to show that the testator considered certain property as his own, and intended to pass it by words not directly referring to it; see *Pole v. Lord Somers*, 6 Ves. 322; *Doe v. Chichester*, 4 Dow. 76, p. 89, 90.

Erroneous belief or recital will not raise election.

An erroneous belief on the part of the testator, even though he expressly declares that he has made his will on the faith of it, will not raise an election. *Langston v. Langston*, 21 B. 552; *Dashwood v. Peyton*, 18 Ves. 27; *Box v. Barrett*, 3 Eq. 244.

In respect of what property of a legatee election arrives.

It makes no difference whether the property attempted to be disposed of by the testator is vested contingent or reversionary; though in the latter case, if the legatee whose reversionary interest is disposed of is a married woman, she cannot elect till her interest falls into possession. *Williams v. Mayne*, 1 R. 1 Eq. 519; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Wilson v. Lord Townshend*, 2 Ves. Jun. 697.

Release of a debt due from a third person to a legatee.

And the release of a debt due to the testator from A., the testator at the same time releasing a debt due from B. to A., will put A. to his election. *Synge v. Synge*, 15 Eq. 389, 9 Ch. 128.

Legatee must be entitled to the property given away at the testator's death.

It is sufficient to raise election if the property disposed of by the testator is the property of a person taking a benefit under the will at the date of the testator's death, and a title as next of kin to an intestate whose estate has not at the date of the death been fully administered is sufficient. *Cooper v. Cooper*, L. R. 6 Ch. 15, *ib.* 7 H. L. 53.

Title as

In such a case, for the purpose of election, the inte-

rest of the next of kin is to be estimated as it was at the death of the intestate, his debts being rateably distributed over his estate, *ib.*

next of kin
to an intes-
tate.

But if the property in question is not acquired till after the death of the testator, no election arises in respect of it. *Howells v. Jenkins*, 2 J. & H. 706, 1 D. J. & S. 617; *Grissell v. Swinhoe*, 7 Eq. 291, in which case it seems the husband would have been bound to elect if he had been his wife's administrator at the testator's death. See *Cooper v. Cooper*, 6 Ch. 15, p. 21.

And where a wife had elected to take an estate against the will, the husband, being tenant by the curtesy, was not again put to his election between his tenancy by the curtesy and benefits given to him by the will, compensation having been already made for the value of the estate. *Lady Cavan v. Pulteney*, 2 Ves. Jr. 544, 3 Ves. 384.

Derivative
title.

So too the right of a creditor to be paid out of property belonging to an intestate, and disposed of by the testator, being merely a personal right, will not put the creditor to election between his claim upon the intestate's estate and a benefit given by the will. See *Cooper v. Cooper*, L. R. 7 H. L. 53, p. 66. See *Kidney v. Coussmaker*, 12 Ves. 136.

Mere per-
sonal right.

When a testator having a special power of appointment over certain property appoints absolutely to the objects of the power, and superadds a condition or request that they shall give the property in a certain way, no case of election arises, the illegal condition being considered struck out of the will. *Carver v. Bowles*, 2 R. & M. 301; *Blacket v. Lamb*, 14 B. 482; *Woolridge v. Woolridge*, Johns. 63; *Churchill v. Churchill*, 5 Eq. 44. See *King v. King*, 15 Ir. Ch. 479.

Appoint-
ment under
a special
power with
invalid
condition
superadded
raises no
election.

Where, however, there is no absolute gift in the first instance, but the original gift is, with invalid limitations over and restrictions, the objects of the power must elect

It does
when the
whole ap-
pointment
is invalid.

between their rights under the power and the other benefits given them by the will. *Tomkyns v. Blane*, 28 B. 422.

Property
subject to a
special
power.

And generally election arises where property, subject to a special power of appointment vested in the testator, is given by him to persons not the objects of the power when the latter receive benefits under the will. *Whistler v. Webster*, 2 Ves. Jun. 366.

What is a
disposition
by a tes-
tator of
property
not his
own.

General
words limi-
ted to tes-
tator's own
property.

It must be presumed *primâ facie* that a testator only means to dispose of what is his own.

Therefore, even before the Wills Act, general words will not be construed to apply to property not belonging to the testator, though at the date of his will and his death he may have no property of his own to which the words could apply. *Read v. Crop*, 1 B. C. C. 492; *Jervoise v. Jervoise*, 17 B. 566; *Thornton v. Thornton*, 11 I. Ch. 474.

Devise in
strict
settlement
where tes-
tator has
only estate
pur autre
vie.

Nor will the fact that the devise is to uses in strict settlement extend general words to more than the testator's interest, though his devisable interest is only an estate *pur autre vie*. See *Cosby v. Lord Ashdown*, 10 Ir. Ch. 219.

The testator may of course show that he included lands not his own under the general words by describing them as lands in his own occupation. *Honywood v. Foster*, 30 B. 14.

Property
in a par-
ticular
place.

And if the devise be of property in a particular place, if there is any property of the testator answering the description it will be confined to that. *Rancliffe v. Parkyns*, 6 Dow. 149; *Maddeson v. Chapman*, 1 J. & H. 470.

Property
held in
joint
tenancy.

So where a testator has transferred stock into the names of himself and his wife, a general gift of his stock or even a gift of stock exactly the same in amount as that so transferred, will not put the wife to her election. *Dummer v. Pitcher*, 2 M. & K. 262; *Poole v. Odling*, 10 W. R. 337.

For this purpose there must be a specific reference to the stock in question. *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97.

The case is more difficult where the testator has a devisable interest in certain property, and the question arises whether he intended to give the whole property.

1. Where the testator is entitled in moieties.

When the testator is entitled in moieties.

If the devise is of the testator's interest or property in a house or lands, only what belongs to him is intended to pass. *Henry v. Henry*, 1 R. 6 Eq. 286.

But if the gift is of a house by a particular description, this is a sufficient indication of an intention to pass the whole house at any rate if there is a direction to repair. *Padbury v. Clark*, 2 Mac. & G. 298; *Howell v. Jenkins*, 2 J. & H. 706. See *Swan v. Holmes*, 19 B. 471. And the result is the same where there is no such direction, *Fitzsimons v. Fitzsimons*, 28 B. 417; *Miller v. Thurgood*, 33 B. 496; *Wilkinson v. Dent*, 6 Ch. 339.

Gift of a house with a direction to repair.

2. Where land is subject to a charge, a devise of the land without more is a devise subject to the charge. *Stephens v. Stephens*, 3 Dr. 697, 1 De G. & J. 62; *Henry v. Henry*, 1 R. 6 Eq. 286.

When the testator is entitled to land subject to a charge.

On the other hand, if the testator repudiates the instrument creating the charge, and the dispositions of his will are inconsistent with that instrument, the property is intended to pass freed from the charge. *Sadler v. Butler*, 1 R. 1 Eq. 415.

So, too, if the devise of the land is inconsistent with the charge, as if it be for a long term on trust to raise a sum immediately for payment of debts and legacies, the prior charge being itself secured by a long term. *Blake v. Bunbury*, 1 Ves. Jun. 514.

3. Where the testator has a reversionary interest in land, limited to take effect after the decease of persons to whom he gives a life interest in those lands, so that the

When the testator is entitled to the reversion in lands.

will would be of no effect if it were intended only to deal with the reversion, and there are besides powers of leasing and management implying actual enjoyment, the intention must have been to dispose of the whole property. *Welby v. Welby*, 2 V. & B. 187; *Wintour v. Clifton*, 21 B. 447, 8 D. M. & G. 641.

So, too, a direction that an annuity is to be paid to a person for life out of lands of which the testator has only the reversion shows an intention to dispose of the whole. *Usticke v. Peters*, 4 K. & J. 437.

But if in a doubtful case the testator expressly confirms the settlement by which the reversion in the property in question is limited to him, only his own interest will be held to be intended to pass. *Rancliffe v. Parkyns*, 6 Dow. 149.

What
amounts to
an inten-
tion to
dispose of
lands free
from dower
or free-
bench.

4. The question whether the testator has shewn an intention to dispose of his real estate, freed from the widow's right to dower or free bench, is of importance only, with regard to the former in the case of widows married prior to the 1st January, 1834; and with regard to the latter, in the case of wills not coming under the Wills Act, see the Dower Act, 3 & 4 Will. 4, c. 105, ss. 4 & 14. *Lacey v. Hill*, 19 Eq. 346. As to freebench, it was decided in *Lacey v. Hill*, *supra*, that a devise of copyholds, though not surrendered to the uses of the will, is sufficient to bar the widow's claim by the 3rd section of the Wills Act. The point does not appear to have been raised in *Thompson v. Burra*, 16 Eq. 592.

Gift in lieu
of dower—

In cases, however, under the old law, the widow is, of course, put to her election if a legacy is given to her expressly in lieu of dower. *Sopwith v. Maughan*, 30 B. 235.

what it
includes.

A legacy in lieu of dower would, it seems, also include freebench and dower out of lands which the testator had no power to devise. *Nottley v. Palmer*, 2 Dr. 93; *Walker v. Walker*, 1 Ves. Sen. 54. See *Wetherell v. Wetherell*, 4 Giff. 51.

And if the dispositions of the will are inconsistent with the widow's right to have her dower set out by metes and bounds, she will be put to her election. This will be the case :—

What is inconsistent with the widow's right to dower.

a. If a house, being a portion of the property devised, is given for the personal use and occupation of the devisee. *Miall v. Brane*, 4 Mad. 119; *Roadley v. Dixon*, 3 Russ. 192.

Personal use by the devisee.

So, too, though a devise of realty in definite proportions between the widow and others would not itself show that the widow was not intended to take her dower if the property is particularised so as to show that the testator is giving not merely his estate, but the whole property itself, this is sufficient to show that dower was meant to be excluded. *Reynolds v. Torin*, 1 Russ. 129; *Chalmers v. Storril*, 2 V. & B. 222, as explained in *Bending v. Bending*, 3 K. & J. 257. See *Roberts v. Smith*, 1 S. & St. 513. In *Dickson v. Robinson*, Jac. 508, the will is not stated.

Devise in definite proportions.

A direction that the proceeds of sale are to be divided in certain shares will not have this effect. *Ellis v. Lewis*, 3 Ha. 314.

Trust to sell and divide.

c. If powers of leasing are given even though they be only from year to year. *Reynard v. Spence*, 4 B. 103; *O'Hara v. Chaine*, 1 J. & Lat. 662; *Parker v. Sowerby*, 1 Dr. 488; 4 D. M. & G. 321; *Lowes v. Lowes*, 5 Ha. 501; *Hall v. Hill*, 1 Dr. & War. 94; *Linley v. Taylor*, 1 Giff. 67; see *Warbuton v. Warbuton*, 2 Sm. & G. 163. And it seems that a power of leasing is inconsistent with the widow's right to freebench, though it may not be the custom of the manor to set out freebench by metes and bounds. *Thompson v. Burra*, 16 Eq. 592.

Powers of leasing.

But a trust for sale will not have this effect. *Gibson v. Gibson*, 1 Dr. 42. *Bending v. Bending*, 3 K. & J. 257, unless the property given in trust for sale is esp-

Trust for sale.

cifically directed to include something such as a house, the whole of which the testator must have intended to be subject to the trusts. *Parker v. Downing*, 4 L. J. Ch. 198.

Gift of annuity charged on land subject to dower.

The gift of an annuity to the wife charged upon the property subject to dower will not put her to election. *Dowson v. Bell*, 1 Keen, 761; *Harrison v. Harrison*, 1 Keen, 765; *Holdich v. Holdich*, 2 Y. & C. C. 18.

Nor will a devise of a portion of the testator's real estates to his widow prevent her from claiming dower in the rest. *Lawrence v. Lawrence*, 2 Ver. 365; 1 Eq. C Ab. 218, pl. 2; 1 Freem. 234; 3 B. P. C. 484.

When the heir is put to election.

5. Under the old law by which a testator was unable to dispose of lands acquired after the date of his will, the heir was nevertheless put to his election if there was a clear intention to dispose of them.

Disposition of after-acquired lands before the Wills Act.

It is clear that such an intention is sufficiently indicated where the testator draws a distinction between lands to which he is and lands to which he may be entitled at his decease. *Schroder v. Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance v. Truwhitt*, 2 J. & H. 216; and it seems the words "land which I shall die possessed of" sufficiently indicate an intention to pass after-acquired lands, and not merely so much of the lands belonging to the testator at the date of his will as shall remain at his death. *Churchman v. Ireland*, 1 R. & M. 250, overruling *Back v. Kett*, Jac. 534.

No election when the will is invalid to pass realty.

Under the old law, where the will was insufficiently executed to pass realty, the heir was not put to his election, between realty attempted to be disposed of by the will and benefits given to him, so much of the will as attempted to dispose of realty being considered non-existent. *Sheddon v. Godrich*, 8 Ves. 481.

So, too, when under the old law the testator was incompetent to dispose of property from infancy or cover-

ture no case of election arose. *Hearle v. Greenbank*, 1 Ves. 298; 3 Atk. 697, 716; *Rich v. Cockell*, 9 Ves. 370.

But the case is different where the devise is upon condition. *Boughton v. Boughton*, 2 Ves. sen. 12.

These rules do not, however, apply to a foreign heir, and therefore if there is clear evidence of an intention to dispose by will of land in Scotland or elsewhere which cannot be so disposed of, the heir is put to his election between the land and the benefits he may take under the will. *Brodie v. Barry*, 2 V. & B. 127; *Dewar v. Maitland*, L. R. 2 Eq. 834. Foreign heir.

It must be clear that land in Scotland or elsewhere is referred to, and therefore general words will only be held to refer to those lands upon which the will can take effect. *Johnson v. Telford*, 1 R. & M. 244; *Allen v. Anderson*, 5 Ha. 763; *Maxwell v. Maxwell*, 16 B. 106; 2 D. M. & G. 705; *Maxwell v. Hyslop*, 4 Eq. 407. But a devise of "all my real estate in any part of the United Kingdom or elsewhere" has been held sufficient to put the Scotch heir to election. *Orrell v. Orrell*, 6 Ch. 302.

It would seem that no case for election arises on the part of next of kin where the will of a married woman is operative at the time it was made, but afterwards becomes inoperative. *Blaiklock v. Grindle*, 7 Eq. 215.

The principle of election being compensation in order to put persons whose property the testator has given away to their election, there must be a gift to them of free disposable property out of which compensation may be made. Thus, an appointment by the testator of property, subject to his special exclusive power of appointment, to some objects of the power whose property the testator attempts to dispose of, is not a gift of free disposable property, in respect of which they will be bound to elect. *Fowler's Trust*, 27 B. 362; *Aplin's Trust*, 13 W. R. 1062.

When the will of a married woman becomes inoperative no election arises on the part of next of kin.

To raise election there must be a gift of free disposable property to the persons whose property is given away.

CHAPTER IV.

WHO MAY BE DEVISEES OR LEGATEES.

1. Corporations.

1. PRIOR to the Wills Act a devise of lands to a corporation was void, bodies corporate being excepted out of the statutes 32 Hen. 8, c. 1, 34 & 35 Hen. 8, c. 5, sec. 5.

And it seems the stat. 43 Eliz.⁶⁴ had no effect in passing the legal estate where the devise was to a corporation existing for charitable purposes, notwithstanding *Benet Coll. v. Bp. of London*, 2 W. Bl. 1182; see *Inc. Soc. v. Richards*, 1 Dr. & War. 258.

The Wills Act repeals the statutes 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, but does not expressly authorise devises to corporations, and since the inability of corporations to hold lands was created by various statutes antecedent to the 34 & 35 Hen. 8, c. 5, the mere repeal of that statute does not give validity to devises to corporations.

Since the Wills Act, however, the inability is not in the power of devising, but in the capacity of corporations to take, and it would seem to follow that corporations with power to hold land, such as companies incorporated under the Public Companies' Acts, 25 & 26 Vict. c. 89, sec. 18, might take by devise except so far as objections might arise on the ground of perpetuity. The question is, however, not likely to be of much practical importance; see *Incorp. Soc. v. Richards*, 1 Dr. & War. 258; *Thompson v. Shakespear*, Joh. 612; 1 D. F. & J. 899;

Carne v. Long, 2 D. F. & J. 75; *Cocks v. Manners*, 12 Eq. 574; *Chaudière Mining Company v. Desbarats*, L. R. 5 P. C. 277.

2. By the statute 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, or disposed of, by an alien in the same manner in all respects as by a natural-born British subject. 2. Aliens.

It has been decided that the Act is not retrospective. *Sharp v. St. Sauveur*, 7 Ch. 343. And apparently it does not apply to a will made before the passing of the Act though not coming into operation till afterwards.

In cases before the Act land devised to an alien remains in him till office found, when it devolves to the Crown, and this is the case whether the land is devised to trustees or not. *Barrow v. Wadkin*, 24 B. 1; *Sharp v. St. Sauveur*, 7 Ch. 343.

An alien could always take the proceeds of land devised on trust for sale. *Du Hourmelin v. Sheddon*, 1 B. 79; 4 M. & Cr. 525.

3. Personal property vested in a felon after his conviction during the period of his punishment or before his pardon is forfeited to the Crown (*Roberts v. Walker*, 1 R. & M. 752), but not property which does not vest in him till after his imprisonment. *Stokes v. Holden*, 1 Kee. 145; *Barnett v. Blake*, 2 Dr. & S. 117; *Gough v. Davies*, 2 K. & J. 623; *Re Thompson's Trusts*, 22 B. 506; *Re Harrington's Trust*, 29 B. 24. 3. Felons.

4. By the 15th section of the Wills Act a legacy given to an attesting witness, or to the husband or wife of an attesting witness, is void. A person attesting the signatures of two marksmen witnesses to a will is himself an attesting witness. *Wigan v. Rowland*, 11 Ha. 157. 4. Attesting witness.

But a gift by will to the attesting witness of a codicil is good. *Gurney v. Gurney*, 3 Dr. 208.

Where, however, a contingent gift by will is made ab-

solute by a codicil which the legatee attests, and the legatee could only have taken under the codicil, the gift is void. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

And a gift to an attesting witness is void, though there may be a sufficient number of witnesses without him. *Randfield v. Randfield*, 11 W. R. 847, see 8 H. L. 225; *Cozens v. Crout*, 21 W. R. 781; see *Re Sharman*, L. R. 1 P. & M. 661.

A gift to a witness attesting the will is good, if the will is afterwards revived by a codicil referring to it. *Anderson v. Anderson*, 13 Eq. 381.

A gift to an attesting witness as trustee is not void. *Cresswell v. Cresswell*, 6 Eq. 69.

CHAPTER V.

DESCRIPTION.—WHAT PASSES UNDER A SPECIFIC DESCRIPTION.

WITH regard to the question what evidence is admissible for the purpose of discovering to what the terms of description employed by the testator refer, evidence of the testator's intention must be distinguished from evidence of circumstances from which the Court may conclude what the testator's intention must have been. The former evidence is admissible only in rare cases. The latter is generally admissible. Thus :

What evidence is admissible.

1. "All facts relating to the subject matter of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will." *Doe d. Templeton v. Martin*, 4 B. & Ad. 771, 785, *per Parke, J.*; *Sanford v. Raikes*, 1 Mer. 646.

Surrounding circumstances.

2. Words of art, foreign words, nicknames may be explained by evidence. *Kell v. Charmer*, 23 B. 195; *Goblet v. Beechey*, 3 Sim. 24, 2 R. & My. 624; *Lee v. Pain*, 4 Ha. 251.

Terms of art.

3. Where a word has a meaning in common use, but has a different meaning by local custom, evidence of the custom is admissible. *Shore v. Wilson*, 9 Cl. & F. 545, 566; *Richardson v. Watson*, 1 Nev. & M. 575; *Clayton v. Gregson*, 5 A. & E. 802; *Smith v. Wilson*, 3 B. & Ad. 728; *Anstee v. Helms*, 1 H. & N. 225.

Evidence of custom.

Where a word has a natural meaning but there is nothing to which it can apply.

Where a word has a natural meaning and there is something to which it applies, no evidence admissible.

Patent ambiguity may not be explained.

4. Where a word has a meaning in ordinary language, but there is nothing to which it can apply, evidence is admissible to show that the testator used the word in a meaning peculiar to himself. This case falls within the second head above mentioned.

5. But if the word has a meaning in ordinary language, and there is something to which it applies, evidence is not admissible to show that the testator used it in a different or wider sense, there being no general custom to that effect. *Millard v. Bayley*, L. R. 1 Eq. 378.

6. No evidence is admissible to explain a patent ambiguity; for instance, if the testator uses symbols which on the face of the will require explanation, and have no meaning to any one but himself. *Clayton v. Lord Nugent*, 13 M. & W. 206.

When the admissible evidence has been taken, the following rules apply to determine to what the words of description used by the testator refer :

DESCRIPTION OF THINGS.

Where there is something answering the testator's description that alone passes.

1. *Non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram.*

Therefore, where there is property which exactly fits all the terms of the description, the whole of it passes and no more.

Thus under a devise of "my estate of Ashton," being read as equivalent to at Ashton, only lands in the manor of Ashton passed. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147, 4 Dow. 65 ; *Doe d. Parkin v. Parkin*, 5 Taunt. 321 ; *Doe d. Templeman v. Martin*, 4 B. & Ad. 771 ; *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453 ; *Doe d. Harris v. Greathed*, 8 East, 91 ; *Doe d. Browne v. Greening*, 3 Mau. & S. 171 ; *Doe d. Tyrrel v. Lyford*, 4 Mau. & S. 550 ; *Pogson v. Thomas*, 8 Scott, 621, 6 Bing. N. C. 337

Morrell v. Fisher, 4 Ex. 591; *Webber v. Stanley*, 16 C. B. N. S. 698; *Pedley v. Dodds*, L. R. 2 Eq. 819; *West v. Lawday*, 11 H. L. 875; *Slingsby v. Grainger*, 7 H. L. 278.

It seems that a devise of land of A., or at A., A. being the name of an estate as well as of a parish, will be limited to lands in the parish of A. *Doe d. Chichester v. Oxenden*, 8 Taunt. 147, 4 Dow. 65; *Pogson v. Thomas*, 8 Sc. 621, 6 Bing. N. C. 337.

Meaning of
lands of A.,
lands at A.

On the other hand a devise of my A. lands will pass the whole estate so called. *Doe d. Beach v. Lord Jersey*, 3 B. & C. 870, 1 B. & Ald. 550.

If lands are devised by a particular title, evidence is admissible to show what the testator habitually included under the name. *Ricketts v. Turquand*, 1 H. L. 472. *Webb v. Byng*, 1 K. & J. 580; *Whitfield v. Langdale*, 1 Ch. D. 61, devise of Claggetts.

Meaning of
proper
name may
be ex-
plained.

And in wills, since the Wills Act, everything included under the name at the death of the testator, though added to the estate after the date of the will, will pass. *In re Midland Railway Co.*, 34 B. 525; *Castle v. Fox*, 11 Eq. 542; *Webb v. Byng*, 1 K. & J. 580, is *contra*, but the point was barely argued.

Everything
included
under the
name at
the testa-
tor's death
passes.

As to whether the words “*now occupied by me*” would prevent lands subsequently taken into occupation from passing, see *Hutchinson v. Barron*, 9 W. R. 538; *Jepson v. Key*, 10 Jur. N. S. 392, 12 W. R. 621.

2. *Falsa demonstratio non nocet.*

a. Thus where an object is sufficiently described, additional words, which have no application to anything, may be rejected. *Blague v. Gold*, Cro. Car. 447, 473; *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1.

Inaccurate
descrip-
tion—
part in-
accurate;

b. Where there is a complete description, and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these

subordi-
nate de-
scription if
inaccurate
rejected.

words, if inconsistent with the previous description, may be rejected. *Armstrong v. Buckland*, 18 B. 204; see *Slingsby v. Grainger*, 7 H. L. 273.

Inconsis-
tent de-
scription.

c. Where there is one continuous description, and there is something answering to part of it, and something answering to other part, but the two together are inconsistent, the question is, which are the leading words of description. Thus, under a devise of "all that my farm, called Trogues Farm, now in the occupation of A. C.," the whole farm passed, part of the description being clear, whereas so much of the farm as was in the occupation of A. C. could not have been properly described as Trogues Farm. In the first class of cases under this head there is no repugnancy between the general terms and the particular superadded description, in the second and third class there is a repugnancy between two parts of a description. *Doe d. Beach v. Jersey*, 1 B. & Ald. 550, 3 B. & C. 870; *Down v. Down*, 7 Taunt. 348, 1 J. B. Moo. 80; *Paul v. Paul*, 1 W. Bl. 255, 2 Burr. 1089; *Hardwick v. Hardwick*, 16 Eq. 168; see *Cunningham v. Butler*, 3 Giff. 37, 7 Jur. N. S. 461.

What are
the leading
words.

For the purpose of ascertaining the leading words, it would seem that where a description is followed by restrictive words inconsistent with it, the earlier words will prevail, especially if the restrictive words are less clear and accurate than the earlier words. Cases *supra*, and *Doe d. Remow v. Ashley*, 10 Q. B. 663.

Where the more restricted description of property is followed by a wider description, which would include other property as well, it seems the more restricted description will prevail; for instance, under "my lands in Cokefield, called Hayes Lands," only so much of the Hayes Lands as were in Cokefield passed. *Woodden v. Osbourn*, Cro. El. 674; *Hall v. Fisher*, 1 Coll. 47.

Of course if the restrictive words can be looked upon

as inserted for the purpose of giving the lands carved out of the devise to some one else, they will have their full force. *Higham v. Baker*, Cro. Eliz. 16; *Press v. Parker*, 10 J. B. Mo. 158, 2 Bing. 456.

3. The same rules are applicable to specific bequests of personal property. Therefore, if there is something which answers fully the words of description, that, and that alone, will pass. *Slingsby v. Grainger*, 7 H. L. 273; *Ridge v. Newton*, 2 D. & War. 239.

Same rules apply to specific bequests.

4. If the testator gives a certain number of specific things, and is possessed at the date of his death of a larger number, the legatee is entitled to select which he will take. *Hobson v. Blackburne*, 1 M. & K. 571; *Jacques v. Chambers*, 2 Coll. 435; *Millard v. Bailey*, L. R. 1. Eq. 378; see *Duckmanton v. Duckmanton*, 5 H. & N. 219, 28 L. J. Ex. 132.

Gift of some out of more.

5. In the case of a specific bequest, even before the Wills Act, any increase in the value of the thing specifically given between the date of the will and the death of the testator belonged to the legatee. Thus a gift of the amount of a bond carried the accruing interest. *Harcourt v. Morgan*, 2 Kee. 274; *All Souls' Coll. v. Codrington*, 1 P. Wms. 597.

Increase in value of specific legacy before the testator's death passes to legatee,

But if the description of the gift is such as to preclude the possibility of including in it any increase, such increase will not pass, as if the gift be of 300*l.* due to me on a bond, interest will not pass. *Roberts v. Kuffin*, 2 Atk. 112; *Hawley v. Cutts*, 2 Freem. 24.

unless the description excludes it.

6. If there is a specific gift, as, for instance, of certain stock, and the testator at the date of his will possessed no such stock, but possessed other stock nearly answering the description, the latter will pass. *Door v. Geary*, 1 Ves. sen. 255; *Dobson v. Waterman*, 3 Ves. 307 n.; *Galini v. Noble*, 3 Mer. 691; *Pentecost v. Ley*, 2 J. & W. 207; *Mackinley v. Sison*, 8 Sim. 561; *Sheffield v. Von Donop*,

Inaccurate description.

7 Ha. 42; *Quennell v. Turner*, 18 B. 240; *Ellis v. Eden*, 25 B. 543; *Trinder v. Trinder*, L. R. 1 Eq. 695.

Specific
gift of
something
the testa-
tor has
sold before
the date
of the will.

7. If a testator makes a specific bequest of something which he has not at the date of the will, evidence is admissible to show how the mistake arose, and the fact that the thing in question has been exchanged for something else before the date of the will, will not avoid the legacy. In such a case the legatees are entitled to a sum equal in value to the specific legacy at the testator's death. *Selwood v. Mildmay*, 3 Ves. 306; *Lindgren v. Lindgren*, 9 B. 358; *Goodlad v. Barnett*, 1 K. & J. 341.

Gift of
something
the testator
thinks he
has but
has not.

8. On the other hand, if the testator makes a specific gift of a thing he thinks he has, but never had, or of a thing which he intends to purchase, but does not, the gift is void. *Waters v. Wood*, 5 De G. & S. 717; *Evans v. Tripp*, 6 Mad. 91; *Millar v. Woodside*, L. R. 6 Eq. 546.

Effect of
sale by the
testator of
a thing
specifically
bequeathed
and subse-
quent pur-
chase of a
similar
thing.

9. If the testator bequeaths a specific thing, for instance, a brown horse, which he afterwards sells and replaces by another brown horse, there seems to be some doubt whether the latter would pass by the effect of the 24th section of the Wills Act, which declares that a will shall be construed to speak from the death of the testator with reference to the real and personal estate comprised in it. The negative was held in *Re Gibson*, L. R. 2 Eq. 669; see *Sydney v. Sydney*, 17 Eq. 65; but see *Castle v. Fox*, 11 Eq. 542.

CHAPTER VI.

SPECIFIC, GENERAL, AND DEMONSTRATIVE LEGACIES.

IN the case of bequests of personalty it is often a question of difficulty whether a legacy is general or specific. A general legacy is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate. If a particular fund is made primarily liable the legacy is demonstrative, but does not fail by the failure of the particular fund. On the other hand, a specific legacy is a gift of a severed or distinguished part of the testator's property. It does not abate till after the general legacies are exhausted, but it is liable to ademption by the testator in his life time.

General
and spe-
cific lega-
cies dis-
tinguished.

The most common, though not the only kind of specific legacy, is where the testator gives something which he possesses at the date of the will.

In these cases there must be on the face of the will enough to show that the testator is referring to something actually existing at the time.

Thus a mere legacy of stock in round numbers, though the testator may possess the exact amount of stock, is not specific. *Partridge v. Partridge*, 9 Mod. 269, Ca. t. Talb. 226; *Simmons v. Vallance*, 4 B. C. C. 345; *Wilson v. Brownsmith*, 9 Ves. 180.

Legacy of
stock is not
specific.

Similarly a bequest of 5000*l.* in the South Sea Company's Stock is general, though the testator may have the exact amount at the date of his will. *Purse v. Snaplin*, 1 Atk. 415; *Bronsdon v. Winter*, Amb. 57; *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 565; *Webster v. Hale*,

Nor of
money in
stock.

8 Ves. 410; *Robinson v. Addison*, 2 B. 515; see *Page v. Young*, 19 Eq. 501, where a gift of "the interest of 4500*l.*, money in the funds," was held specific.

As to whether the gift is of so much money to be invested in stock, or of stock of that value, see *Allan v. Kelly*, 7 W. R. 139.

But though the actual gift may not contain anything to show that it is specific, it may appear from the rest of the will that it is so.

Nor of
stock to be
trans-
ferred.

A direction to transfer a certain amount of stock, *Sibley v. Perry*, 7 Ves. 522, 529, or to pay it as soon as possible will not make the legacy specific. *Webster v. Hale*, 8 Ves. 410.

But gift of
stock on
trust to
sell is
specific.

But a gift of stock generally to trustees on trust to sell, shows that the testator referred to specific stock. *Ashton v. Ashton*, Ca. t. Talb. 152, 3 P. W. 384.

Gift of rest
of my
stock
makes pre-
vious gifts
of stock
specific.

So where a testator, having given legacies of stock generally, then gives the rest of the stock "standing in my name," the earlier legacies must be specific. *Sleech v. Thorington*, 2 Ves. sen. 560; see *Millard v. Bailey*, L. R. 1 Eq. 378.

Direction
to purchase
if the tes-
tator
should not
have suffi-
cient stock
to answer
legacies of
stock pre-
viously
given.

And a direction that if the testator should not have sufficient stock standing in his name to answer the legacies of stock previously given, the executors should purchase sufficient to make up the deficiency, shews that the testator meant to give something in existence at the time. *Townsend v. Martin*, 7 Ha. 471; *Fountaine v. Tyler*, 9 Pr. 94; *Queen's Coll. v. Sutton*, 12 Sim. 521. The same is the case with a gift of 4000*l.*, capital stock, in the 3 per cent. Consolidated Bank Annuities, "or in whatsoever of the government funds the same should be found invested." *Hosking v. Nicholls*, 1 Y. & C. C. 478.

Effect of
legacy of
stock not
in round
numbers

If the legacy is not of stock in round numbers, but, for instance, of 2702*l.* 3*s.*, Bank Annuities, and he has the exact amount, it would seem the argument in favour of

specific gift is much stronger. *Jeffreys v. Jeffreys*, 3 Atk. 120 ; see *Robinson v. Addison*, 2 B. 515.

But a gift of " my " stock is specific. *Ashburne v. Maquire*, 2 B. C. C. 108 ; *Miller v. Little*, 2 B. 259.

The effect of the Wills Act upon such a gift is to leave it specific, though it includes all the stock of the particular description belonging to the testator at his death. *Lady Langdale v. Briggs*, 8 D. M. & G. 391 ; *Trinder v. Trinder*, L. R. 1 Eq. 695 ; *Bothamley v. Sherson*, 20 Eq. 304.

A gift of a part of a specific fund is specific. *Ford v. Fleming*, 1 Eq. Ca. Ab. 302, pl. 3, 2 P. W. 469 ; *Nelson v. Carter*, 5 Sim. 530 ; *Oliver v. Oliver*, 11 Eq. 506.

So, too, a gift of a specific thing to be sold and divided in definite shares among several persons is a gift of specific legacies. *Page v. Leapingwell*, 18 Ves. 463 ; *Jeffrey's Trusts*, L. R. 2 Eq. 68.

Similarly a gift of money out of specific money, or of stock " out of " specific stock, is specific ; as, for instance, money out of the dividends of stock, or money out of money invested in stock. *Drinkwater v. Falconer*, 2 Ves. sen. 623 ; *Morley v. Bird*, 3 Ves. 628 ; *Hosking v. Nicholls*, 1 Y. & C. Ch. 478 ; *Badrack v. Stevens*, 3 B. C. C. 431 ; *Mullins v. Smith*, 1 Dr. & Sm. 204.

On the other hand a gift of money out of stock is not specific, but demonstrative. *Kirby v. Potter*, 4 Ves. 748 ; *Deane v. Test*, 9 Ves. 146.

And if there is an independent gift of money, followed by a direction to pay it out of certain specific monies, the legacy is demonstrative. *Roberts v. Pocock*, 4 Ves. 150 ; *Acton v. Acton*, 1 Mer. 178.

Where the gift is not " out of " but " of " only, as 100*l.* of my funded property, it is more difficult to decide under which of the two last heads the gift falls. It seems, however, that if the testator estimates his stock in money, a gift of 100*l.* of my stock is specific.

where the testator has the exact amount.

Gift of "my stock" is specific.
Effect of Wills Act.

Gift of part of specific fund.

Gift of money out of money.

Money out of stock.

Independent gift followed by a direction to pay out of a certain fund.

Gift of £100 of my funded property.

Davies v. Fowler, 16 Eq. 308. See *Brennan v. Brennan*, I. R. 2 Eq. 321. But if he does not, and gives merely a gift of 100*l.* of my funded property, it is equivalent to a gift of money out of stock, and is therefore not specific. *Lambert v. Lambert*, 11 Ves. 607.

Whether a gift is of money out of money, or of money out of stock.

In some cases a difficulty may arise whether the testator meant money out of money or money out of stock.

It is clear that a gift of "2000*l.* Long Annuities now standing in my name" is specific, though the testator may only have had a much smaller sum. *Gordon v. Duff*, 28 B. 519, 3 D. F. & J. 662. Whether it is a gift of Long Annuities to the amount of 2000*l.* a year, or of 2000*l.* in gross, seems doubtful, but probably this would depend on the state of the testator's property.

But if the gift is of "50*l.* of Bank Long Annuities Stock standing in my name," as such stock has no existence, and the gift might equally well be of a lump sum of 50*l.*, or of 50*l.* per annum, it is necessary to refer to the state of the testator's property to discover what he may have meant, and whether the gift is of 50*l.* per annum Long Annuities, or of the sum of 50*l.* to be paid out of Long Annuities. If the property is insufficient to satisfy the legacies, if construed as legacies of so much per annum Long Annuities, the legacies will be demonstrative legacies of so much money out of Long Annuities. *Boys v. Williams*, 3 Sim. 563, 2 R. & M. 688. See *A.-G. v. Grote*, 3 Mer. 316, 2 R. & M. 699; *Colpoys v. Colpoys*, Jac. 451, and *Fonnereau v. Poyntz*, 1 B. C. C. 471, as explained by Lord Eldon, 6 Ves. 400.

Legacy may be specific yet not subject to ademption.

It has been said that a specific legacy must be liable to ademption, and that therefore there could not be a specific legacy of a thing which the testator had not at the date of the will. See *Parrott v. Worsfold*, 1 J. & W. 594.

But it is now clear that a testator may make a specific gift of a thing of which he contemplates the acquisition,

as, for instance, of the stock he may die possessed of. *Fountaine v. Tyler*, 9 Pr. 94; *Stewart v. Denton*, 4 Dougl. 219, 2 Chitty, 456; *Stephenson v. Dowson*, 3 B. 342; *Queen's Coll. v. Sutton*, 12 Sim. 521.

Whether the gift of a sum "invested" in a particular way is specific or not, depends on the question whether the testator meant the legatee to have the sum, however invested, or whether the actual investment is the important part of the description.

Whether a gift of a sum "invested" in a particular way is specific.

Thus a gift of "the" 7000*l.* out on mortgage is clearly specific. *Gardner v. Hatton*, 6 Sim. 93.

But if the bequest is of a sum of money "now" invested in a certain way, the word "now" shows that the testator contemplated a change of investment as possible, and therefore the investment is immaterial. *Guillaume v. Adderley*, 15 Ves. 385; *Le Grice v. Finch*, 3 Mer. 50. See *Sparrow v. Josselyn*, 16 B. 135; *Patrick v. Yeatherd*, 12 W. R. 304.

And if the gift is merely of a sum invested in a particular way, it would seem that this may very well be construed as a gift of that sum to be invested in that way. *Mytton v. Mytton*, 19 Eq. 30; *Bevan v. A.-G.*, 4 Giff. 361, 2 N. R. 52.

But if the gift is of 300*l.*, or *thereabouts*, invested by the testatrix in a certain way, the words or *thereabouts* show that the sum is immaterial and that the investment is the important part of the gift. *Kermode v. MacDonald*, L. R. 1 Eq. 457; *ib.*, 3 Ch. 584.

A gift of a particular debt, or of the money due on a particular security is specific; as for instance of "my mortgage," or "the money now owing to me from A." *Innes v. Johnson*, 4 Ves. 568; *Sidebotham v. Watson*, 11 Ha. 170; *Ellis v. Walker*, Amb. 309; *Smallman v. Goolden*, 1 Cox, 329; *Gardner v. Hatton*, 6 Sim. 93. See *Sidney v. Sidney*, 17 Eq. 65.

Gift of a particular debt.

So too the gift of the interest of money on a particular security is specific. *Ashburner v. M'Guire*, 2 B. C. C. 108.

So too a gift of a sum of money "which" is secured in a particular way is specific. *Chaworth v. Beech*, 4 Ves. 556; *Guillaume v. Adderley*, 15 Ves. 384; *Davies v. Morgan*, 1 B. 405; or of money described as "being" on a particular security. *Nelson v. Carter*, 5 Sim. 530; *Ford v. Fleming*, 3 P. W. 469, S. C. 1 Eq. Cas. Ab. 302, pl. 3. See *Sparrow v. Josselyn*, 16 B. 135; *Smith v. Pybus*, 9 Ves. 566.

Where there was a bequest to a debtor of the amount of his debt, subject to and charged with certain annuities which he was directed to pay, followed by a direction that any sums owing from the debtor were to be in satisfaction of the legacy, the annuities were held payable out of the general assets. *Vickers v. Pound*, 6 W. R. 580, 4 Jur. N. S. 543, 6 H. L. 885.

WHETHER A GIFT IS OF A SPECIFIC OR AN ALIQUOT PART OF FUND.

Whether a gift is of a specific or aliquot part of a fund.

A gift of a definite sum, part of a specific fund, is *prima facie* a gift of that precise sum, whether the fund turns out more or less, and not of an aliquot part of the fund. *Smith v. Fitzgerald*, 3 V. & B. 2; *Booth v. Alington*, 6 D. M. & G. 613.

The testator may, however, show an intention that the legatees were to take aliquot parts of the fund. See *Chambers v. Chambers*, Mos. 333; *Cordell v. Noden*, 2 Vern. 148.

LEGACIES CONNECTED WITH LAND.

Devise of land is specific whether residuary or not.

A devise of lands is specific, whether by specific description or by residuary devise. *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136.

So, too, a devise of land to be sold and divided among certain persons makes them specific legatees. *Page v. Leapingwell*, 18 Ves. 463; *Newbold v. Roadknight*, 1 R. & M. 677. Devise on trust to sell and divide.

So, too, the gift of a rent-charge or annuity to be paid out of land with powers of distress is specific. *Long v. Short*, 1 P. W. 403; *Davenhill v. Fletcher*, Amb. 244; *Creed v. Creed*, 11 C. & F. 491. See *Poole v. Heron*, 42 L. J. Ch. 348. Gift of rent-charge.

But a mere gift of an annual sum or of a legacy to be paid out of real estate, will not be specific. *Mann v. Copland*, 2 Mad. 223; *Fowler v. Willoughby*, 2 S. & St. 354; *Colville v. Middleton*, 3 B. 570. Of annual sum to be paid out of land.

Much less a gift of a legacy or an annuity with a mere charge on land. *Wilcox v. Rhodes*, 2 Russ. 452; *Davies v. Ashford*, 15 S. 42; *Paget v. Huish*, 1 H. & M. 663. Legacy with mere charge on land.

But a trust to raise a sum of money out of land, which sum is then given, is a specific legacy. *Welby v. Rockcliffe*, 1 R. & M. 571; *Dickin v. Edwards*, 4 Ha. 273. Trust to raise a sum out of land.

So, too, a direction to pay a sum out of land, the only gift being in the direction to pay, is specific. *Spurway v. Glyn*, 9 Ves. 483.

And in such a case the fact that the personalty is given after payment of legacies will not make the gift of a sum out of the proceeds of sale of realty demonstrative. *Rickets v. Ladley*, 3 Russ. 418. Effect of directions in the will on legacies in themselves specific.

Though, on the other hand, where a testatrix gave her real and personal estate on trust to pay the legacies thereafter given, a subsequent gift out of the proceeds of sale of realty was held demonstrative. *Hodges v. Grant*, 4 Eq. 140.

And where a legacy was given out of a fund which was not available till the death of A., but there was a direction that it was to be paid with the other legacies, it was held demonstrative. *Williams v. Hughes*, 24 B. 474.

WHETHER A GIFT IS SPECIFIC OR RESIDUARY.

Whether a gift is specific or residuary. Enumeration of specific things.

A mere enumeration of specific things in a residuary bequest will not make the gift of those things specific. *Taylor v. Taylor*, 6 Sim. 246; *Sutherland v. Cooke*, 1 Coll. 498; *Fielding v. Preston*, 1 De G. & J. 438.

The cases in which it has been held that as between tenant for life and remainderman of a residue the fact of specific enumeration of certain things is a strong argument in favour of specific enjoyment by the former, are no authorities on the question whether the gift of those things is specific in the sense here discussed, though where the tenant for life has not been held entitled to specific enjoyment, the things specifically mentioned are *a fortiori* not specific legacies. See this distinction well illustrated in *Fielding v. Preston*, 1 De G. & J. 438; see *post*, p. 1012

Effect of words "as well as," "together with," etc.

But if the specific things are distinguished from the residue by such words as "as well as," or "together with," or "and also," the gift of them is specific. *Clarke v. Butler*, 1 Mer. 304; *Hill v. Hill*, 11 Jur. N. S. 806; *Langdale v. Esmonde*, 1 R. 4 Eq. 576; *Fitzwilliam v. Kelly*, 10 Ha. 266.

And if the enumeration of specific things comes after the gift of the residue, the same result will follow. *Bethune v. Kennedy*, 1 M. & Cr. 114; *Mills v. Brown*, 21 B. 1.

A direction that certain funds are in certain events to fall into the residue will not make the gift of those funds specific. *Lynes' Estate*, 8 Eq. 482.

Effect of specific mention of certain lands in residuary devise.

And a devise of particular lands and all the rest and residue of the testator's estate and effects real and personal is apparently a specific gift of the particular lands as well as of the residuary lands for all purposes: *Castle v. Gillett*, 16 Eq. 530; though, if the testator refers to the subject of the gift as "the same residuary estate,"

it will be a residuary gift proper. *Thorman v. Hillhouse*, 7 W. R. 332, 5 Jur. N. S. 563; see *post*, p. 92.

WHETHER A GIFT OF THE REST OR RESIDUE OF A
SPECIFIC FUND IS SPECIFIC.

Where a testator gives the residue of a specific fund and estimates that residue in money the gift of the residue is specific. *Haslewood v. Green*, 28 B. 1; *Walpole v. Apthorp*, 4 Eq. 37.

Whether a gift of the residue of a fund is specific.

So, too, where a testator estimates a specific fund in money, and gives definite portions of it, a gift of the rest is as specific as if he had stated it in figures. *Page v. Leapingwell*, 18 Ves. 463; *Walpole v. Apthorp*, 4 Eq. 37; *Miller v. Huddleston*, 6 Eq. 65; *Elwes v. Clauston*, 30 B. 554; *Wright v. Weston*, 26 B. 429.

But if the fund is given subject to debts, the gift of the residue will not be specific. *Harley v. Moon*, 1 Dr. & S. 623; *Baker v. Farmer*, 3 Ch. 537.

So, too, though the testator estimates the fund in money, if the residue is given subject to or after payment of specific gifts, the gift of the residue is not specific, but will carry everything undisposed of, by reason of lapse or otherwise. *Carter v. Taggart*, 16 Sim. 423; *Harries' Trust*, Jo. 199; but see *Miller v. Huddleston*, 6 Eq. 65.

So, if the fund is estimated in figures, but the testator shows that he considers it fluctuating in amount by adding "or other the stock funds or securities of which the same may for the time being consist," the gift of the residue is not specific. *De Lisle v. Hodges*, 17 Eq. 440.

And though the fund is in fact definite in amount, if the testator merely describes it generally, without estimating it in figures, the gift of the residue is not specific. *Petre v. Petre*, 14 B. 197; *Vivian v. Mortlock*, 21 B. 252.

CHAPTER VII.

CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

Legacies of equal amount by the same instrument are mere repetitions.

I. LEGACIES of equal amount given by the same instrument are merely repetitions. *Holford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 M. & K. 29; *Brine v. Ferrier*, 7 Sim. 549; *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 B. 453.

But there may be an intention to give both: *Barkenshaw v. Hodge*, 22 W. R. 484, where the gift was to trustees, and the legacies were introduced by the words "upon trust to pay," and "upon further trust to pay," etc.

And parol evidence would be admissible to show that the testator meant the legatee to have both legacies, such evidence being in support of the *prima facie* meaning of the instrument. See *Hurst v. Beach*, 5 Mad. 351; *Hall v. Hill*, 1 Dr. & War. 94.

Legacies of unequal amount by the same instrument are cumulative.

If the legacies are not equal the legatee is entitled to both. *Yockney v. Hansard*, 3 Ha. 622; *Curry v. Pile*, 2 B. C. C. 225; *Baylee v. Quin*, 2 Dr. & War. 116; *Adnam v. Cole*, 6 B. 353.

Legacies by different instruments are cumulative.

II. Legacies of equal, less, or greater amount, given by different instruments, as by will and codicil to the same person, are *prima facie* cumulative. *Hooley v. Hatton*, 1 B. C. C. 390 n.; *Lee v. Pain*, 4 Ha. 201, 216; *Roch v. Cullen*, 6 Ha. 531; *Cresswell v. Cresswell*, 6 Eq. 69; *Wilson v. O'Leary*, 12 Eq. 525; 7 Ch. 448; *Walsh v. Walsh*, 1. R. 4 Eq. 396.

In the same way a bequest of a share of residue by will and of a pecuniary legacy by a codicil are cumulative. *Gordon v. Anderson*, 4 Jur. N. S. 1097.

It makes no difference that the codicil recites the gift by will. *Guy v. Sharp*, 1 M. & K. 589.

The fact that some legacies in the codicil are expressed to be in addition affords an argument that the others are substitutional, but is not conclusive. *Hooley v. Hatton*, 1 B. C. C. 390 n.; *Allen v. Callow*, 3 Ves. 289; *Mackenzie v. Mackenzie*, 2 Russ. 272; *Wray v. Field*, 2 Russ. 257, 6 Mad. 300; *Barclay v. Wainwright*, 3 Ves. 462.

The fact that a legacy given by a codicil is expressed to be in addition to a legacy given by the will does not show that it is not also in addition to a legacy by a prior codicil. *Spire v. Smith*, 1 B. 419; *Watson v. Reed*, 5 Sim. 431; see *Sawrey v. Rumney*, 5 De G. & Sm. 698.

III. It may, however, appear that the gift by the later instrument is intended to be substitutional. This may be shown :

1. By the form of the second instrument.

a. If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument. *Jackson v. Jackson*, 2 Cox, 35; *Kidd v. North*, 14 Sim. 463, 2 Ph. 91; *Tuckey v. Henderson*, 33 B. 174.

b. If the additional instrument recites that the testator has not time to alter his will, legacies given by it will be substitutional. *Russell v. Dickson*, 4 H. L. 293.

c. If the additional instrument is treated as explanatory of and to be incorporated into the will, the case may be brought within the rule as to additional gifts in the same instrument. *Duke of St. Alban's v. Beauclerk*, 2 Atk. 636; *Fraser v. Byng*, 1 R. & M. 90.

And in the same way several testamentary papers may

Legacies by different instruments will be substitutional—

if the instruments themselves are substitutional.

be so connected together as to be in fact one instrument. *Brine v. Ferrier*, 7 Sim. 549.

The same will be the case where there is a gift to a person with a different gift written in the margin of the will. *Martin v. Drinkwater*, 2 B. 215.

or mere
repetitions
of each
other,

2. From the contents of the second paper, as where the second instrument is not a codicil but a testamentary paper, and in effect makes the same dispositions as a prior testamentary paper. *Gillespie v. Alexander*, 2 S. & S. 145; *A.-G. v. Harley*, 4 Mad. 263; *Hemming v. Gurney*, 2. S. & St. 311, 1 Bl. N. S. 479.

So one codicil may appear to be a mere repetition of another. If, for instance, both are of the same date, and contain the same provisions in all respects. *Whyte v. Whyte*, 17 Eq. 50.

So if though not of the same date the legatees are the same and certain specific legacies as well as the residue are given by both. *Duke of St. Alban's v. Beauclerk*, 2 Atk. 636; see *Cooté v. Boyd*, 2 B. C. C. 521, and *Campbell v. Earl of Radnor*, 1 B. C. C. 271; see *Roxburgh v. Fuller*, 13 W. R. 39.

if the
terms of
the second
gift show
that it was
meant to
be substi-
tutional.

3. Or it may appear from the character of the second gift itself that it is meant to be substitutional.

a. If the second gift only adapts the bounty to circumstances that have happened; as, for instance, the death of prior legatees. *Barclay v. Wainwright*, 3 Ves. 462; *Allen v. Callow*, 3 Ves. 289; *Osborne v. Duke of Leeds*, 5 Ves. 369.

b. If the second gift can be looked upon as explanatory of the prior gift. *Moggridge v. Thackwell*, 1 Ves. jun. 473.

c. If by a codicil the testator revokes a portion of a prior gift and then repeats the rest so that the repetition may be explained as *ex abundanti cautela*. *Benyon v. Benyon*, 17 Ves. 34; *Hinchcliffe v. Hinchcliffe*, 2 Dr. & S. 96.

d. If the second gift is coupled with a gift of some specific thing already given, this shows it to be substitutional. *Currie v. Pye*, 17 Ves. 462; see *Lord Mayor of London v. Russell*, Finch, 290; explained 6 Ir. Ch. 131.

e. And generally it seems that a difference in the way in which the two gifts are given is in favour of their being cumulative. *Hodges v. Peacock*, 3 Ves. 735; *Lee v. Pain*, 4 Ha. 201. Though, on the other hand, if the two gifts are of the same amount, but given to different trustees, the argument is the other way. *Benyon v. Benyon*, 17 Ves. 34.

f. The testator may show by a reference to a gift in one codicil as a "sufficient" provision that the gift so given was all the legatee was intended to have. *Robley v. Robley*, 2 B. 95.

IV. Gifts by different instruments of the same amount and expressed to be given from the same motive are substitutional. *Benyon v. Benyon*, 17 Ves. 34.

It must, however, be clear that the testator is expressing a motive and not merely giving a description; thus, in the case of gifts of equal amount to a "servant," the term servant is merely descriptive. *Roch v. Cullen*, 6 Ha. 531; *Suisse v. Lowther*, 2 Ha. 424; *Wilson v. O'Leary*, 12 Eq. 522; 7 Ch. 448.

If, however, the gifts are not of the same amount they are cumulative. *Hurst v. Beach*, 5 Mad. 352.

V. Additional legacies are subject to the same incidents as the original legacy.

A gift in addition to or in lieu of a previous gift is subject to the same conditions as the previous gift with respect to vesting, separate estate, the fund out of which it is payable, and freedom from legacy duty. *Leacroft v. Maynard*, 1 Ves. jun. 279; 3 B. C. C. 233; *Crowder v. Clowes*, 2 Ves. jun. 449; *Day v. Croft*, 4 B. 561; *Duncan v. Duncan*, 27 B. 392; *Earl of Shaftesbury v. Duke of*

Gifts of the same amount given from the same motive are substitutional.

Additional and substitutional gifts are subject to the same incidents as the original gift.

Marlborough, 7 Sim. 237 ; *Bristow v. Bristow*, 5 B. 289 ; *Cooper v. Day*, 3 Mer. 154.

It makes no difference that the legacy is not expressed to be in addition to the previous gift. *Johnson v. Lord Harrowby*, Johns. 425 ; 1 D. F. & J. 183.

The rule does not apply where a legacy is given to a person in lieu of a legacy to another legatee who has predeceased the testator. *Chatteris v. Young*, 2 Russ. 184.

Nor does it apply where the condition in question is limited by the will to legacies "hereinafter" given, and the additional legacy is given by a codicil. *Bonner v. Bonner*, 13 Ves. 379 ; *Strong v. Ingram*, 6 Sim. 197.

It is not quite clear whether an additional or substitutional gift will be subject to the same executory gifts over as the original gift ; it seems, however, that it will not. *Crowder v. Clowes*, 2 Ves. jun. 449 ; *Alexander v. Alexander*, 5 B. 518 ; see *Donnellan v. O'Neill*, 1 R. 5 Eq. 523.

But an additional legacy given in terms which would give an absolute interest is not subject to limitations of the prior gift which would cut it down to a life interest. *Haley v. Bannister*, 23 B. 336 ; *More's Trust*, 10 Ha. 171 ; *Mann v. Fuller*, Kay, 624 ; *Hill v. Jones*, 37 L. J. Ch. 465 ; see *Cookson v. Hancock*, 2 M. & Cr. 606 ; *Hargreaves v. Pennington*, 11 W. R. 1047.

CHAPTER VIII.

THE INCIDENTS ATTACHING TO SPECIFIC AND GENERAL LEGACIES.

I. ADEPTION.

A SPECIFIC legacy is adeemed if it is afterwards converted by the testator into something else. *Ashburner v. M'Guire*, 2 Br. C. C. 108.

A specific legacy is adeemed if converted by the testator,

And a charge upon a specific bequest is gone if the specific bequest is adeemed. *Cowper v. Mantell*, 22 B. 223.

The same is the case if the legacy is converted by some duly constituted authority, such as an order in lunacy. *Shaftsbury v. Shaftsbury*, 2 Ver. 747; *Jones v. Green*, 5 Eq. 555; or even destroyed by vis major, such as the loss of a ship. *Durrant v. Friend*, 5 De G. & Sm. 348.

or a proper authority,

or even vis major.

But there will be no ademption where the specific thing has been converted without authority. *Basan v. Brandon*, 8 Sim. 171; *Taylor v. Taylor*, 10 Ha. 475; *Jenkins v. Jones*, L. R. 2 Eq. 323; see *Browne v. Groombridge*, 4 Mad. 495.

But not by improper conversion.

And a mere transfer of a thing specifically given from trustees to the testator will not be an ademption. *Dingwell v. Askew*, 1 Cox, 427; see *Amb. 260*, 3 B. C. C. 416; *Clough v. Clough*, 3 M. & K. 296; *Jones v. Southall*, 82 B. 31.

Mere transfer from trustees to testator will not adeem.

Nor will a change made in it which leaves the thing to all intents the same as it was before; as, for instance, the

Nor will a formal change.

conversion of shares into stock by a resolution of the company. *Oakes v. Oakes*, 9 Ha. 666; *Pilkington's Trusts*, 6 N. R. 246; see *Partridge v. Partridge*, Cas. t. Talb. 226.

Receipt by testator if he does not mix the thing received with his estate will not adeem.

So, too, a bequest of the share to which the testator may be entitled in the property of another person is not adeemed by the fact that the testator subsequently receives the share and invests it in a particular security, though it will be if he receives it and mixes it with his estate. *Lee v. Lee*, 27 L. J. Ch. 824; *Moore v. Moore*, 29 B. 496; *Clarke v. Browne*, 2 Sm. & G. 524.

Effect of change of security.

And it would seem a bequest of certain trust funds "and the securities upon which they may be invested" would not be adeemed by a mere change of security, though it will if the testator receives the money and lends it on security for his own purposes. *Jones v. Southall*, 32 B. 31.

Confirmation of a will does not revive adeemed legacy.

The confirmation of a will by a codicil will not revive a legacy which has been adeemed in the meantime. *Drinkwater v. Falconer*, 2 Ves. sen. 626; *Monck v. Monck*, 1 Ba. & B. 306; *Cowper v. Mantell*, 22 B. 223; *Hopwood v. Hopwood*, 7 H. L. 728.

But since the Wills Act, where a thing specifically given has been changed into something of a similar nature, as when bonds are converted into shares, and the testator afterwards confirms his will, the shares have been held to pass under the description of bonds. *Pilkington's Trusts*, 6 N. R. 246; but see *Pattison v. Pattison*, 1 M. & K. 12.

Gift of a debt is adeemed by payment to the testator.

In the same way the specific gift of a debt due to the testator, and afterwards received in whole or part by him, whether the debtor pays it voluntarily or not, is adeemed *pro tanto*. *Ashburner v. M'Guire*, 2 B. C. C. 108; *Fryer v. Morris*, 9 Ves. 360; *Humphries v. Humphries*, 2 Cox, 185.

Effect where a fresh debt is incurred.

And where a particular sum owing to the testator is bequeathed and afterwards received by him, a fresh debt afterwards incurred by the same debtor will not pass, at

any rate, if the sums are not precisely the same. *Gardner v. Hatton*, 6 Sim. 93; *Sidney v. Sidney*, 17 Eq. 65.

Where things in a particular place, such as a house, are given and are afterwards removed to another place, the question is whether the place is a substantive part of the bequest, or whether it is merely descriptive of the things the testator refers to.

Gift of things in a house when adeemed.

In the latter case the removal of the things to another place is immaterial. *Cunningham v. Ross*, 2 Cas. t. Lee, 272; *Norris v. Norris*, 2 Coll. 719; *Blagrove v. Coore*, 27 B. 138; *Norreys v. Franks*, I. R. 9 Eq. 18. *Rawlinson v. Rawlinson*, 24 W. R. 946.

Removal is immaterial if the place is merely descriptive.

If, however, the bequest of the things is connected with the enjoyment of the house both being given to the legatee; *Colleton v. Garth*, 6 Sim. 19; or if the gift is of such furniture as may be in a particular place at the testator's decease, a permanent removal works an ademption. *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Heseltine v. Heseltine*, 3 Mad. 276; *Green v. Symonds*, 1 B. C. C. 129 n.; *Spencer v. Spencer*, 21 B. 548.

Secus if the intention is to give only such things as may be in the place.

But a removal for a temporary purpose will not have this effect. *Domville v. Baker*, 32 B. 604; *Chapman v. Hart*, 1 Ves. sen. 271; *Norreys v. Franks*, I. R. 9 Eq. 18; *Land v. Devaynes*, 4 B. C. C. 537; *Lord Brooke v. Earl of Warwick*, 2 De G. & S. 425.

Temporary removal will not adeem.

II. CHANGE OF INTEREST OF TESTATOR.

A somewhat different question arises where the nature of the testator's interest in the subject matter of a bequest alters between the date of the will and his death; if, for instance, the testator subsequently acquires the reversion of leaseholds given by his will.

Effect of change in the testator's interest after the date of the will.

Before the Wills Act a specific bequest of a lease, unless the testator being *cestui que trust* gave his interest

Acceptance of a new lease.

in the lease which includes the right to the benefit of a renewal by the trustee : *Carte v. Carte*, 3 Atk. 174 ; or expressly gave his future interest : *James v. Dean*, 11 Ves. 388, 15 Ves. 238, was adeemed by the acceptance of a new lease or the acquisition of the reversion : *Marwood v. Turner*, 3 P. Wms. 163 ; *James v. Dean*, 15 Ves. 238 ; *Abney v. Miller*, 2 Atk. 593 ; *Capel v. Girdler*, 9 Ves. 509 ; *Slatter v. Noton*, 16 Ves. 197 ; and a general gift of lands or a house in which the testator had a chattel interest was *prima facie* a gift of that interest and subject to ademption in the same way. *Rudstone v. Anderson*, 2 Ves. 418 ; *Hone v. Medcraft*, 1 B. C. C. 261 ; *Coppin v. Fernyhough*, 2 B. C. C. 291 ; *Colegrave v. Manby*, 6 Mad. 72 ; 2 Russ. 238.

Effect of
the Wills
Act.

It seems, however, that the 24th section of the Wills Act applies to such a case, and since that statute the subsequent acquisition of the reversion will not be an ademption of the gift. *Struthers v. Struthers*, 5 W. R. 809 ; *Cox v. Bennett*, 6 Eq. 422 ; not following *Emuss v. Smith*, 2 De G. & Sm. 722 ; and see *Miles v. Miles*, L. R. 1 Eq. 462 ; *Wedgwood v. Denton*, 12 Eq. 290 ; *Leckey v. Watson*, I. R. 7 C. L. 157.

III. RIGHT OF RETAINER.

Right of
retainer
against
specific
legatee.

It seems doubtful whether a specific legacy can be subject to the executor's right of retainer for a debt due from the legatee to the estate. *Harvey v. Palmer*, 4 De G. & S. 425.

IV. EXONERATION OF SPECIFIC LEGACIES.

1. Liabilities created by testator.

Exonera-
tion of
specific
legacies
from debts

A specific legatee has a right to have his specific legacy freed from the debts and liabilities of the testator existing at his decease. *Stewart v. Denton*, 4 Doug. 219,

S. C. 2 Chit. 456 ; *Barry v. Harding*, 1 J. & Lat. 489 ; *Fitzwilliams v. Kelly*, 10 Ha. 266. and liabilities of testators.

So if the testator has pledged the legacy, whether for his own debt or not, the legatee is entitled to compensation. *Knight v. Davis*, 3 M. & K. 358 ; *Bothamley v. Sherson*, 20 Eq. 304.

2. Liabilities incident to the thing.

With regard to payments on specific legacies which become due after the testator's decease, the distinction is between charges created by the testator and charges incident to the chattel.

Thus rent or fines falling due after the testator's death are payable by the legatee. *Fitzwilliams v. Kelly*, 10 Ha. 266. Rent falling due after the testator's death.

As to calls upon shares, the cases are somewhat conflicting ; but on the whole it seems if the testator's estate does not remain liable, the liability must be borne by the specific legatee. *Armstrong v. Burnet*, 20 B. 424. Calls on shares must be paid by legatee.

And even if the testator's estate remains liable, but the liability is such that neither the testator nor his estate might ever have become chargeable with it, such as the liability on shares in a banking or insurance company, the specific legatee must bear it. *Armstrong v. Burnet*, *supra*. *Adams v. Ferrick*, 26 B. 384 ; see *Wright v. Warren*, 4 De G. & S. 367 ; *Fitzwilliams v. Kelly*, 10 H. 266.

And it seems that calls on railway shares made after the testator's decease must be borne by the specific legatee. *Day v. Day*, 1 Dr. & Sm. 261.

It would seem that *Blount v. Hopkins*, 7 Sim. 43 ; *Jacques v. Chambers*, 4 Rail. Cases, 499 ; and *Clive v. Clive*, Kay, 600, would not now be followed, unless the two former can be supported on the ground that the testator had covenanted to pay the calls within a given time.

V. EXONERATION OF MORTGAGED PROPERTY.

Exoneration of mortgaged property in cases before Locke King's Act.

In cases not affected by Locke King's Act, 17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 69, the devisee of mortgaged lands, the mortgages upon which have been either created or adopted by the testator, is entitled, in the absence of a contrary intention, to have the mortgage paid off out of the first four classes of property in the administration of assets; and as regards the fourth, viz., real estate charged with debts generally, if the mortgaged lands are themselves included in the general charge of debts, they must bear a proportionate part of the mortgage. *Middleton v. Middleton*, 15 B. 450; *Harper v. Munday*, 7 D. M. & G. 369.

Pecuniary legacies are not applicable to exonerate mortgaged property, whether freehold or leasehold. *Lutkins v. Leigh*, Cas. t. Talb. 53; *Johnson v. Child*, 4 Ha. 87.

Similarly, where mortgaged lands descend, the heir is entitled to exoneration out of the first two classes of property. *Hill v. Bp. of London*, 1 Atk. 621; *Chester v. Powell*, 7 Jur. 389; *Young v. Furse*, 20 B. 380.

Devise of mortgaged lands subject to the mortgage will not exonerate the personality.

A devise of lands expressly subject to the mortgage thereon will not exonerate the personality, the words "subject to the mortgage" being held merely descriptive. *Duke of Ancaster v. Meyer*, 1 Bro. C. C. 454; *Bickham v. Crutwell*, 3 M. & Cr. 763.

Nor will a direction that part of the mortgaged land is to bear a larger proportion of the mortgage than other part. *Goodwin v. Lee*, 1 K. & J. 377.

Charge of mortgages on the mortgaged land in a distinct sentence.

But it would seem that a charge of the mortgage debt upon the mortgaged land in a distinct sentence will make the land primarily liable. *Evans v. Cockeram*, 1 Col. 428. See *Hancox v. Abbey*, 11 Ves. 179.

The law on this subject has been altered by Locke King's Act, 17 & 18 Vict. c. 113, which enacts that "when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made, or to be made before the 1st of January, 1855."

AS TO WHAT PERSONS ARE WITHIN THE ACT.

The Crown taking personalty in default of next of kin is within the words "persons claiming through or under the deceased person." *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

What persons are within the Act.

The heir taking by descent, owing to lapse or other-

wise, from a person dying after the 31st December, 1854, is not entitled to exoneration by the exception in the proviso, though the will may be made before the 1st January, 1855. *Power v. Power*, 8 Ir. Ch. 340; *Piper v. Piper*, 1 J. & H. 91; *Nelson v. Page*, 7 Eq. 25.

On the other hand, a devisee taking under a will made before the 1st January, 1855, is within the proviso, though the will may have been republished after that date. *Rolfe v. Perry*, 3 D. J. & S. 481.

AS TO WHAT PROPERTY IS WITHIN THE ACT.

What property is within the Act.

Land devised on trust for sale, and coming to the testator as personalty, is not within the Act: *Lewis v. Lewis*, 13 Eq. 218; nor are leaseholds: *Solomon v. Solomon*, 12 W. R. 540, 10 Jur. N. S. 331; *Gael v. Fenwick*, 22 W. R. 211; but copyholds are. *Piper v. Piper*, 1 J. & H. 91.

S. 40 & 41 in
c. 34

AS TO WHAT MORTGAGES ARE WITHIN THE ACT.

What mortgages are within the Act.

Mortgages by deposit of title deeds, with or without a memorandum of agreement to execute a legal mortgage, are within the Act. *Pembroke v. Friend*, 1 J. & H. 132; *Davis v. Davis*, 24 W. R. 962.

So is a deposit of deeds, with a memorandum, though expressed to be only a collateral security. *Coleby v. Coleby*, L. R. 2 Eq. 803.

But a mere general charge by a testator on real estate in aid of his personalty is not within the Act. *Hepworth v. Hill*, 30 B. 476.

Nor is a covenant to pay off a mortgage on land not belonging to the covenantor. *Day v. Day*, 14 W. R. 261.

A lien for unpaid purchase money upon lands purchased by a testator is, by 30 & 31 Vict. c. 69, s. 2, within the Act, but not a similar lien upon lands purchased by an intestate. *Harding v. Harding*, 13 Eq. 493.

WHAT IS A CONTRARY INTENTION WITHIN THE ACT.

It was decided that a general direction to pay debts, or to pay debts out of the estate, did not show the contrary intention required by the Act. *Pembroke v. Friend*, 1 J. & H. 132; *Brownson v. Lawrance*, 6 Eq. 1; *Woolstencroft v. Woolstencroft*, 2 D. F. & J. 347.

What is a contrary intention within the Act.

Direction to pay debts is not;

Whether the fact that mortgaged lands are devised in strict settlement would make any difference seems doubtful, at any rate it would not where the testator himself contemplates the mortgages as subsisting from generation to generation. *Coote v. Lowndes*, 10 Eq. 376.

But a direction that the debts are to be paid out of the personal estate, or out of any particular fund, is a contrary intention. *Moore v. Moore*, 1 D. J. & S. 602; *Eno v. Tatham*, 3 D. J. & S. 443, 32 L. J. Ch. 311; *Melish v. Vallins*, 2 J. & H. 194; *Newman v. Wilson*, 31 B. 33; *Maxwell v. Hyslop*, L. R. 4 Eq. 407, ib. 4 H. L. 506. See *Allen v. Allen*, 30 B. 395.

but a direction to pay debts out of the personal estate or a particular fund is.

By the 30 & 31 Vict. c. 69, however, it is enacted that in the wills of testators dying after the 31st Dec., 1867, a declaration that debts are to be paid out of the personal estate is not to be deemed a declaration of intention to exonerate mortgaged lands. And since this Act a direction to pay debts out of a particular fund will not entitle the devisee to exoneration from a mortgage. *Gael v. Fenwick*, 22 W. R. 211.

The Amendment Act, 30 & 31 Vict. cap. 69.

Under this Act, "if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to them;" per Giffard, V.-C., in *Nelson v. Page*, 7 Eq. 25, p. 28. See *Allen v. Allen*, 30 B. 395; *Greated v. Greated*, 26 B. 621.

Specific devisee of part of land subject to a mortgage is not entitled to exoneration as against the residuary devisee.

Effect of direction to pay mortgages out of a fund which is insufficient.

Whether mortgaged lands applicable in payment of mortgages bear more than the mortgages upon them.

Devisee is entitled to rents from the testator's death.

Where part of lands subject to a mortgage is specifically devised, and the rest given to the residuary devisee, or where a life interest is given, and the remainder is given to the residuary devisee, there is no evidence of an intention within the Act that the mortgage is to be borne by the residuary devisee. *Gibbins v. Eyden*, 7 Eq. 371: *Sackville v. Smith*, 17 Eq. 153, overruling *Brownson v. Lawrence*, 6 Eq. 1.

The further question may arise whether, supposing the testator directs the mortgages to be paid out of a specific fund, the devisees will be entitled to exoneration, if that fund is insufficient.

It would seem, where the fund is a fund of personalty, the devisees will not be entitled to exoneration beyond the value of the fund. *Rodhouse v. Mold*, 13 W. R. 854, 35 L. J. Ch. 67.

On the other hand, it is laid down by Lord Romilly in *Allen v. Allen*, 30 B. 403, that where a mortgage on Whiteacre is directed to be paid out of Blackacre the mortgagee is entitled to exoneration out of the personal estate in the first place, as the Act only directs that the mortgaged land shall be primarily liable, and does not alter the ordinary rules of administration, where there is an intention that it should not be so liable. But *quære* whether the decision above cited and this dictum are reconcilable.

It would seem that where mortgages are directed to be paid, and the personalty is insufficient to pay them, the several lands bear only the mortgages secured upon them, and not a proportionate share of all the mortgages. *Wisden v. Wisden*, 5 Jur. N. S. 455.

VI. RENTS AND PROFITS.

A devise of lands being specific carries the rents and profits from the death of the testator.

Since the Apportionment Act, 33 & 34 Vict. c. 35, rents are to be considered as accruing from day to day, and are apportionable where the testator dies between two rent days. The Act applies to residuary as well as specific devises, and apparently it makes no difference whether the will is made before or since the Act. *Capron v. Capron*, 17 Eq. 288; *Hasluck v. Pedley*, 19 Eq. 271; *Rosengrove v. Burke*, I. R. 7 Eq. 187.

Apportionment Act.

Where a legacy is charged upon land only, interest is payable from the testator's death. *Spurway v. Glyn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393; *Pearson v. Pearson*, 1 Sch. & Lef. 10.

Legacy charged on land only, carries interest from the death.

On the other hand, a legacy charged upon the proceeds of the sale of lands bears interest only from a year after the testator's death. *Turner v. Buck*, 18 Eq. 301.

Not if charged on proceeds of sale of lands.

CONTINGENT GIFTS.

1. A future devise of lands, whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits, which pass either under the residuary clause, if there is one, or to the heir. *Hopkins v. Hopkins*, Ca. t. Talb. 45; *Duffield v. Duffield*, 3 Bl. N. S. 260; *Percival v. Percival*, 9 Eq. 386; *Eddel's Trust*, 11 Eq. 559.

Future devise does not carry the intermediate rents,

And the intermediate rents are undisposed of till the actual birth of the devisee. *Richards v. Richards*, Jo. 754; *Mowlem's Trust*, 18 Eq. 9; see *Rawlins v. Rawlins*, 2 Cox, 425.

2. Nor will a future residuary devise carry intermediate rents and profits. *Hodgson v. Earl of Bective*, 1 H. & M. 376, 10 H. L. 656.

whether residuary or not.

3. A contingent residuary gift of personalty carries the intermediate interest during the period allowed for accumulation. *Green v. Ekins*, 2 Atk. 478; *Drakeley's Estate*, 19 B. 395.

A future residuary bequest carries the intermediate interest.

Chattels real follow the same rule. *Hodgson v. Earl of Bective*, 1 H. & M. 376, 10 H. L. 656.

So will a future residuary gift of a mixed fund.

4. And if realty and personalty are blended in a future residuary gift, intermediate profits will pass. *Genery v. Fitzgerald*, Jac. 468; *Glanvill v. Glanvill*, 2 Mer. 38; *Ackers v. Phipps*, 9 Bl. N. S. 431, 3 Cl. & F. 665.

But personalty to be laid out in land, or realty to be converted, follow the rules of personalty and realty respectively. *Bective v. Hodgson*, 10 H. L. 656.

Where there is a gift to a class the income goes to those who take vested interests from time to time.

When there is a gift to a class, which is capable of increase up to the time of distribution, the whole of the income for the time being goes to those members who take vested interests from time to time. *Shepherd v. Ingram*, Amb. 448; *Mills v. Norris*, 5 Ves. 335; *Scott v. Earl of Scarborough*, 1 B. 154; *Mainwaring v. Beever*, 8 Ha. 44.

Specific legacy carries profits.

A specific legacy carries with it all the income and profits which may accrue upon it after the testator's death. *Clive v. Clive*, Kay, 600; *Maclaren v. Stainton*, 3 D. F. & J. 202; and see *Carron Company v. Hunter*, L. R. 1 Sc. H. L. 362.

Whether apportionment applies between specific and residuary legatees.

It has been held that the Apportionment Act, 1870, does not apply as between specific and residuary legatees. *Whitehead v. Whitehead*, 16 Eq. 528; see, however, 18 Eq. 329.

It does not to the profits of a private partnership.

It does not apply to the profits of a private partnership. *Jones v. Ogle*, 8 Ch. 192.

What are profits.

The question sometimes arises what are profits accruing after the death of the testator.

Bonus on shares.

A bonus or dividend on shares declared before the testator's death, but not payable till afterwards, will not pass with the shares. *Lock v. Venables*, 27 B. 598; *De Gendre v. Kent*, L. R. 4 Eq. 283.

Partnership profits.

Nor will the profits of a partnership, declared after the testator's death, for a period ending in his lifetime. *Ibbotson v. Elam*, L. R. 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586.

On the other hand, a debt is to be considered as the Debts profits of the year in which it is paid. *Maclaren v. Stainton*, 3 D. F. & J. 202.

In determining what is corpus and what interest, the Apportionment Acts apply, as well between tenant for life and remainderman, as where in certain events an absolute interest is cut down to a life interest. *Clive v. Clive*, 7 Ch. 433.

Apportionment applies where a life interest is cut down.

VII. INTEREST ON GENERAL LEGACIES.

Where a legacy is contingent, or payable at a future time, and interest is given in the meantime, or the income is given for maintenance, the whole interest or income as it accrues vests absolutely in the legatee. *Harris v. Finch*, M'Clel. 141; *Peek's Trust*, 16 Eq. 221.

Interest given to a legatee vests absolutely as it accrues.

General legacies, including gifts by appointment under a power vested in a married woman, are payable at the end of a year from the testator's death. *Tatham v. Drummond*, 2 H. & M. 262.

From what time interest is payable on general legacies when no time for payment is appointed.

A. Therefore, where no time for payment is fixed, interest runs from that time, whether the legacies are payable "as soon as possible," or not. *Webster v. Hale*, 8 Ves. 410; *Benson v. Maude*, 6 Mad. 15.

A legacy payable out of any particular part of the assets of the testator bears interest from a year after his death, though it may be directed to be paid out of such assets "when received," the assets being presumed to be got in at the end of a year. *Wood v. Penoyre*, 13 Ves. 325.

Effect of a direction to pay out of a fund when received.

But if the testator considers it doubtful whether the fund in question will ever become part of his assets, interest is not payable till it is actually got in. *Lord v. Lord*, L. R. 2 Ch. 782.

It makes no difference that the legacies are charged upon personalty and a reversionary interest in realty,

Effect of charge on a reversionary interest.

and if the personalty is insufficient the legacies, nevertheless, bear interest from a year after the death. *Freeman v. Simpson*, 6 Sim. 75; *Earl of Milltown v. French*, 4 Cl. & F. 276; 10 Bl. N. S. 1.

But this is not the case where the fund out of which the legacy is primarily payable is wholly reversionary. *Earl v. Bellingham*, 24 B. 448.

In what cases interest is payable from the death. Testator in *loco parentis* to an infant. Maintenance directed out of the legacy. Legacy in satisfaction of a debt.

On the other hand interest is payable from the testator's death:—

1. Where the testator is the father or in *loco parentis* to the legatee, provided the latter is an infant. *Wilson v. Maddison*, 2 Y. & C. C. 372.

2. Where the legatee, though a stranger, is an infant, and maintenance is given out of the legacy (*Newman v. Bateson*, 3 Sw. 689), even though the legacy may be contingent. *Re Richards*, 8 Eq. 119.

3. Where the legacy is in satisfaction of a debt of the testator. *Clarke v. Sewell*, 3 Atk. 99.

A legacy in satisfaction of the debts of another person will not *primâ facie* carry interest till the expiration of a year from the testator's death. *Askew v. Thompson*, 4 K. & J. 620; but if certain property is to be applied among such persons as have "any just or indisputable demand" upon a third person, interest will be payable on the debts as far as the fund will go. *Aston v. Gregory*, 6 Ves. 151.

When a time of payment is fixed interest runs from then.

B. A legacy payable at a future day, whether vested or not, carries interest only from the time fixed for its payment. *Lloyd v. Williams*, 2 Atk. 108; *Heath v. Perry*, 3 Atk. 101; *Festing v. Allen*, 5 Ha. 575; *Gotch v. Foster*, 5 Eq. 311; *Lord v. Lord*, L. R. 2 Ch. 782; *Holmes v. Crispe*, 18 L. J. Ch. 439.

If the period arrives in the testator's lifetime interest runs from his death. *Coventry v. Higgins*, 14 Sim. 80; *Pickwick v. Gibbes*, 1 B. 271.

But though a period is appointed for payment, or the legacy is contingent, interest runs from the death :—

1. Where the legatee is an infant child of the testator, or an infant to whom the testator has placed himself in *loco parentis*, and the will provides no other maintenance, whether the legacy be vested or contingent. *Harvey v. Harvey*, 2 P. W. 21; *Inclendon v. Northcote*, 3 Atk. 432, 438; *Donovan v. Needham*, 9 B. 164; see *Mole v. Mole*, 1 Dick. 310.

Exceptions.

Testator in *loco parentis* to an infant.

And where there is provision for maintenance during a portion of the minority of the legatee, interest on the legacy will be allowed during the rest. *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369; see *Cusack v. Jellicoe*, 22 W. R. 344.

2. And even where the legatees are strangers if a general intention is expressed of providing for their maintenance out of their legacies, they will carry interest from the death. *Pett v. Fellows*, 1 Sw. 561, note; *Lambert v. Parker*, Coop. t. Eldon, 143; *Leslie v. Leslie*, Ll. & G. t. Sug. 1.

General intention to provide maintenance.

The fact that maintenance is given in one particular event which does not happen is not enough. *Festing v. Allen*, 5 Ha. 575.

And now, under Lord Cranworth's Act, 23 & 24 Vict. c. 145, sec. 26, which applies to wills executed or confirmed after the 28th August, 1860, the whole or any part of the income of any legacy, to the income and capital of which an infant is contingently entitled, may be paid towards his maintenance in all cases. *Re Cotton*, 1 Ch. D. 232; see, too, *In re Breed's Will*, 1 Ch. D. 226.

Lord Cranworth's Act.

3. Where a fund is directed to be at once set apart from the rest of the testator's estate it carries the income from the testator's death. *Bodley v. Dawes*, 1 Kee. 362; *Dundas v. Wolfe Murray*, 1 H. & M. 425; *Kidman v. Kidman*, 40 L. J. Ch. 359.

Severed fund.

But the severance must be necessary from causes connected with the legacy itself, and not, for instance, because the residue has become immediately payable. *Festing v. Allen*, 5 Ha. 578.

Future gift of principal with interest.

Where there is a future gift of principal "with interest," interest is calculated from the end of a year after the testator's death till the time of payment. *Knight v. Knight*, 2 S. & St. 490.

Where a vested legacy is divested the interest belongs to the legatee up to the period of divesting.

Where a vested legacy is given to an infant and no time of payment is fixed and the legacy is given over upon a contingency, the infant or his representatives are entitled to the interest which has accrued due till the contingency happens. *Taylor v. Johnson*, 2 P. W. 504; *Barber v. Barber*, 3 M. & Cr. 688; *Mills v. Robarts*, 1 R. & M. 555.

The person taking a vested interest under the gift over, no condition as to payment being annexed to his gift, is entitled to interest from the time when the gift over takes effect, or from a year after the testator's death whichever period is latest. *Laundy v. Williams*, 2 P. W. 481.

PAYMENT OF ANNUITIES.

From what time annuities are payable.

An annuity begins to run from the death of the testator, the first payment is therefore due at the end of a year unless the annuity is directed to be paid monthly or quarterly, in which case instalments are payable at the end of the first month or quarter: *Houghton v. Franklin*, 1 S. & St. 390.

And if the first payment of an annuity payable quarterly is directed to be made at the end of eighteen months, a quarter's instalment is payable at that time. *Irvin v. Ironmonger*, 2 R. & M. 531.

As to the postponement of an annuity till debts and legacies are paid, see *Astley v. Earl of Essex*, 6 Ch. 898; *Rawson v. M'Causland*, 1 R. 7 Eq. 284; 22 W. R. 145.

It does not appear to be quite settled when interest is payable on a gift of a particular legacy, not residuary, to one for life with remainder over; see *Gibson v. Bott*, 7 Ves. 89, where Lord Eldon lays down that interest is not payable till the end of the second year.

Particular legacy for life with remainder.

Arrears of an annuity will not as a rule carry interest. *Batten v. Earnley*, 2 P. Wms. 163; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Martin v. Blake*, 3 Dr. & War. 125; *Taylor v. Taylor*, 8 Ha. 120; *Torre v. Browne*, 5 H. L. 555; *Wheatley v. Davies*, 24 W. R. 818.

Arrears of an annuity do not carry interest.

VIII. LEGACY DUTY.

Legacy duty, in the absence of a direction to the contrary, is in all cases payable by the legatee even though the legacy is to a creditor in discharge of a debt due from a third person. *Foster v. Ley*, 2 Sc. 438; 2 B. N. C. 269.

Legacy Duty—what amounts to a gift free from duty.

Legacies given free from deduction or free from expense are free from duty. *Barksdale v. Gilliatt*, 1 Sw. 652; *Courtoy v. Vincent*, T. & R. 433; *Gosden v. Dotterill*, 1 M. & K. 56; *Louch v. Peters*, 1 M. & K. 489; see *Stow v. Davenport*, 5 B. & Ad. 357; 2 Nev. & M. 835, and see *Turner v. Mullineux*, 1 J. & H. 334.

Free from deductions.

A gift of a clear sum or annuity is a gift clear of legacy duty. *Gude v. Mumford*, 2 Y. & C. Ex. 448; *Haynes v. Haynes*, 3 D. M. & G. 590.

Gift of a "clear" sum.

So is a gift of a fund to produce a clear annual sum, which sum is to be paid to the legatee. *Morris v. Burton*, 11 Sim. 161; *Cole's Will*, 8 Eq. 271.

But a gift of a fund to produce a clear annual sum and to pay the dividends of the stock, and not the exact sum to the legatee, is not a gift free from legacy duty, the term clear being referred to the costs of investment. *Banks v. Bracthwaite*, 32 L. J. Ch. 35; *Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 B. 497.

CHAPTER IX.

AS TO THE MEANING OF CERTAIN WORDS.

Money—
what it
includes.

I. MONEY includes bank notes: *Chapman v. Hart*, 1 Ves. jun. 271; and money at the bank on a current account as well as on deposit: *Manning v. Purcell*, 7 D. M. & G. 55; and money in the hands of an agent of the testator: *Ogle v. Knipe*, 8 Eq. 434; and apparently arrears of a superannuation allowance from government, and money payable by a friendly society for funeral expenses: see *Collins v. Collins*, 12 Eq. 455; and any money, of which at the time of the testator's death, he might have claimed immediate payment, but not an apportioned part of an annuity nor accruing interest: *Byrom v. Brandreth*, 16 Eq. 476; *Collins v. Collins*, 12 Eq. 455; nor money deposited with a stakeholder to abide the event of a bet: *Manning v. Purcell*, *supra*; nor money due on a current account from a salesmaster: *Smith v. Butler*, 3 J. & L. 565; *De Roebuck v. Lord Cloncurry*, 1. R. 5 Eq. 588; nor stock in the funds. *Hotham v. Sutton*, 15 Ves. 319; *Gosden v. Dotterill*, 1 M. & K. 56; *Ommaney v. Butcher*, T. & R. 260; *Lowe v. Thomas*, Kay, 369; 5 D. M. & G. 315; *Collins v. Collins*, 12 Eq. 455.

Will not
pass stock.

Unless
there is no
money.

Money will, however, pass stock where there is at the date of the will and the death no money properly so called: *Chapman v. Reynolds*, 28 B. 221; or where stock is expressly referred to as money: *Newman v. Newman*, 26 B. 218.

In some cases a larger sense has been given to the term money, and it has been held to pass the residuary personalty. When the word money will pass the residue.

1. It is clear that a gift of "the whole of my money" will only pass money properly so called, though there may be very little of it, and it is given for life with remainders, at any rate where the gift is followed by specific or general bequests. *Lowe v. Thomas*, Kay, 369; 5 D. M. & G. 315; *Larner v. Larner*, 3 Dre. 704.

So, too, money must be construed strictly where it is used as one of several terms of description, showing that it was not alone meant to pass the personal estate. *Cowling v. Cowling*, 26 B. 449.

2. But where the testator declared himself desirous of making a settlement of his affairs, and appointed executors to take and receive all monies in his possession or due to him, the whole personal estate was held to pass. *Waite v. Combes*, 5 De G. & S. 676.

And in *Prichard v. Prichard*, 11 Eq. 232, the whole personal estate was held to pass under a gift of the "income of my principal money" to A. for life, and afterwards to be divided among her children, apparently on the ground that there was only a sum of 239*l.* money proper at the testator's death.

3. When there is a direction to pay debts, or legacies have been given, and the residue of money is then given, the whole personal estate will pass. The general personalty being liable to pay debts and legacies, the residue must be a residue *ejusdem generis*. *Lynn v. Kerridge*, West. Rep. tem. Hard. 172; *Legge v. Asgill*, T. & R. 265, n.; *Rogers v. Thomas*, 2 Kee. 8; *Dowson v. Gaskoin*, Ib. 14; *Stocks v. Barré*, Jo. 54; *Barrett v. White*, 24 L. J. Ch. 724; 1 Jur. N. S. 652; *Grosvenor v. Durston*, 25 B. 99. See, too, *Langdale v. Whitfield*, 4 K. & J. 426. *Gosden v. Dotteril*, 1 M. & K. 56, must be considered overruled. Gift of residue of money after payment of debts and legacies.

In such a case the fact that a specific legacy is afterwards given makes no difference. *Montagu v. Earl of Sandwich*, 33 B. 324.

Similarly, where the testator gave his money and goods to his wife for life, and at her death bequeathed certain legacies and the remainder of his property, the money was held to include the personal estate, as the testator showed that he was disposing at his wife's death of the same property as he meant her to have for life. *Glendening v. Glendening*, 9 B. 324.

Of course, if there is an express gift of residue, money must be construed in its strict sense. *Willis v. Plaskett*, 4 B. 208.

The same is the case where the word is not money, but "ready money:" *Re Powell*, Jo. 49; or "money to my account:" *Hastings v. Hane*, 6 Sim. 67; or "money in bonds or consols or anything else:" *Stooke v. Stooke*, 35 B. 396; or where money is referred to as "such cash:" *Nevinson v. Lady Lennard*, 34 B. 487.

Money "of or to which I may be possessed or entitled."
Money due and owing.

"Money of or to which the testator may be possessed or entitled" will include monies due on security or otherwise. *Langdale v. Whitfield*, 4 R. & J. 426.

"Money due and owing at the testator's decease" will pass a balance at the bank: *Carr v. Carr*, 1 Mer. 541; stock: *Waite v. Combes*, 5 De G. & S. 676; damages recovered by the executor and unliquidated at the time of the death: *Bide v. Harrison*, 17 Eq. 76; money receivable on a policy of insurance upon the testator's life: *Petty v. Wilson*, L. R. 4 Ch. 574; and money due to the testator from an executor where the estate has been got in before the testator's death: *Bainbridge v. Bainbridge*, 9 Sim. 16; see *Byrom v. Brandreth*, 16 Eq. 475; but not a distributive share in a residuary personal estate not proved to have been got in at the time of the death: *Martin v. Hobson*, 8 Ch. 401; see

Collins v. Doyle, 1 Russ. 135; nor money due on a contract of service not completed till after the testator's death. *Stephenson v. Dowson*, 3 B. 342; *Wilkes v. Collin*, 8 Eq. 338.

"Ready money" will pass money at call at a bank: *Parker v. Marchant*, 1 Y. & C. Ch. 290; 1 Ph. 356; *Powell's Trust*, Jo. 49; *Vaisey v. Reynolds*, 5 Russ. 12; or in the hands of an agent used as a banker: *Fryer v. Rankin*, 11 Sim. 55; but not notes of hand: *Powell's Trust*, *supra*; nor debts due from an agent: *Parker v. Marchant*, *supra*; or in the hands of a salesmaster: *Smith v. Butler*, 1 J. & L. 692; nor dividends not demanded: *May v. Grove*, 3 De G. & S. 462; nor rent or interest due on a mortgage: *Fryer v. Rankin*, *supra*.

Ready-money.

Similarly "cash" will not include bonds, long annuities, or promissory notes. *Beales v. Crisford*, 13 Sim. 592.

Cash.

As to the meaning of the words "money in the funds:" see *Burnie v. Getting*, 2 Coll. 324; *Mangin v. Mangin*, 16 B. 300; *Ridge v. Newton*, 2 D. & War. 239; *Slingsby v. Grainger*, 7 H. L. 273; *Ellis v. Eden*, 23 B. 543; *Brown v. Brown*, 6 W. R. 613.

Money in the funds.

"Securities for money" will not pass a balance on current account at the bank: *Vaisey v. Reynolds*, 5 Russ. 12; nor money on a deposit account: *Hopkins v. Abbott*, 19 Eq. 222; nor I. O. U.'s: *Barry v. Harding*, 1 J. & Lat. 475; nor shares: *Huddleston v. Gouldbury*, 10 B. 547; *Turner v. Turner*, 21 L. J. Ch. 843; nor bank stock: *Ogle v. Knipe*, 8 Eq. 434; nor mere debts: *Re Mason's Will*, 34 B. 494; nor a lien for unpaid purchase money: *Goold v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116; nor money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after certain payments, but it passes money lent on mortgage, the right to receive which is in the testator: *Ogle v. Knipe*, *supra*; and stock in the funds: *Bescoby v. Pack*, 1 S. & St. 500.

Securities for money.

Whether
the legal
estate in a
mortgage
passes.

And under the term securities for money the legal estate in mortgaged property will pass whether there are words of limitation or not. *King's Mortgage*, 5 De G. & S. 644; *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115; 10 Bing. 44; 3 M. & Sc. 687; *Rippen v. Priest*, 13 C. B. N. S. 308.

And this will be the case though the subject matter of the gift is expressly made subject to payment of debts, a direction inapplicable to the legal estate. *Re Field*, 9 Ha. 414; *Knight v. Robinson*, 2 K. & J. 503; overruling *Silvester v. Jarman*, 10 Pr. 78.

It seems the fact that the gift is to several persons, as tenants in common, would not prevent the legal estate from passing. *Ex parte Whiteacre*, cited 1 Sand. on Uses, 359 n.; 1 Jar. 661.

Money on
security.

It seems doubtful whether the term "money on security" will by itself pass the legal estate in mortgaged property: *Re Cautley*, 17 Jur. 124; 22 L. J. Ch. 391; but it will if the donee is to *receive* money on security, &c. *Doe d. Guest v. Bennett*, 6 Ex. 892; *Arrowsmith's Trust*, 27 L. J. Ch. 704; 4 Jur. N. S. 1123; see *Brown v. Brown*, 6 W. R. 613.

But the term will not pass a charge created under a settlement to which the testator is entitled. *Earl Poulett v. Hood*, 35 B. 234.

Railway
shares.

Under the description railway shares, shares and stock will pass together. *Morrice v. Aylmer*, L. R. 10 Ch. 148; *Ib.* 7 H. L. 717, overruling *Oakes v. Oakes*, 9 Ha. 666.

Plate.

A gift of plate does not include plated articles. *Holden v. Ramsbottom*, 4 Giff. 205.

Furniture.

Furniture *primâ facie* includes only such furniture as is reserved for domestic or personal use: *Farrant v. Spencer*, 1 Ves. sen. 97; *Pratt v. Jackson*, 2 P. Wms. 302; 1 Bro. P. C. 222; *Manning v. Purcell*, 2 Sm.

& G. 284; 7 D. M. & G. 55; *Domvile v. Taylor*, 32 B. 604.

It includes plate; not wine or books: *Kelly v. Powlett*, Amb. 605; *Porter v. Tournay*, 3 Ves. 311; see too, *Cole v. Fitzgerald*, 1 S. & St. 189; 3 Russ. 301; *Birch v. Dawson*, 2 A. & E. 37.

A gift of furniture in a house passes only the furniture permanently kept there. *Wilkins v. Jodrell*, 11 W. R. 588.

Under the term stock, growing crops will pass to the devisee of the land where they grow: *Blake v. Gibbs*, 5 Russ. 13 n. Farming stock.

But, apparently, if the farm is devised to A. and the stock to B., growing crops will pass to B. only if the gift of the stock is coupled with the general personal estate. *Cox v. Godsalve*, 6 East, 604 n.; *West v. Moore*, 8 East, 339; *Rudge v. Winnal*, 12 B. 357; and *Vaisey v. Reynolds*, 5 Russ. 12; and see *Harvey v. Harvey*, 32 B. 441; *Creagh v. Creagh*, 13 Ir. Ch. 28; *Burbidge v. Burbidge*, 16 W. R. 76.

As to the meaning of plant and goodwill, see *Blake v. Shaw*, Jo. 732; *Churton v. Douglas*, Ib. 174; as to live and dead stock, *Hutchinson v. Smith*, 11 W. R. 417. Plant and goodwill; live and dead stock.

The word legacy is primarily applicable to personalty only. Legacy.

It does not apply to land given on trust for sale and division: *White v. Lake*, 6 Eq. 188; but it does to a legacy charged on real estate: *Hodges v. Grant*, 4 Eq. 140.

But it may refer to realty if there is nothing else to which it can refer: *Hope d. Brown v. Taylor*, 1 Burr. 268; *Hardacre v. Nash*, 5 T. R. 716.

Similarly the appointment of a residuary legatee will only give him personal property. *Windus v. Windus*, 21 B. 373; 6 D. M. & G. 549; *Hillas v. Hillas*, 10 I. Eq. 134; *Re Giles*, 14 Ir. Ch. 311; *Kellett v. Kellett*, 3 Dow. 248. Legatee.

When the residuary legatee takes realty.

But the appointment of a person "residuary legatee of all *my property*" will give him realty. *Warren v. Newton*, Drury, 464; *Day v. Daveron*, 12 Sim. 200; *Davenport v. Coltman*, 9 M. & W. 481; 12 Sim. 588.

So, too, if the testator expresses an intention of disposing of all his real and personal estate, and then appoints a residuary legatee. *Pitman v. Stevens*, 15 East, 505.

Or if he expressly shows that he includes realty in the residuary gift by a direction not to sell a house till the death of the tenant for life, on whose death the property becomes divisible among the residuary legatees. *Davenport v. Coltman*, 9 M. & W. 481.

And when realty and personalty are made a mixed fund for the payment of legacies, it seems the residuary legatee will take everything that remains. *Evans v. Crosbie*, 15 Sim. 602; *Wildes v. Davies*, 1 Sm. & G. 475; see *post*, p. 96.

Annuities are legacies.

The word legacies includes annuities: *Bromley v. Wright*, 7 Ha. 334; *Ward v. Grey*, 26 B. 485; *Mullins v. Smith*, 1 Dr. & S. 204; *Heath v. Weston*, 3 D. M. & G. 601; *Sibley v. Perry*, 7 Ves. 522.

And the term pecuniary legacies would also, it would seem, include annuities. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

But if the testator expressly distinguishes between legatees and annuitants, legacies will not include annuities. *Gaskin v. Rogers*, *supra*; *Weldon v. Bradshaw*, I. R. 7 Eq. 168.

It seems the term legacy does not *primâ facie* include a gift of residue, though legatee would include a residuary legatee. *Ward v. Grey*, 26 B. 485.

What the word "will" includes.

The word will includes *primâ facie* all testamentary instruments, which, together, make the will: *Crosbie v. Macdouall*, 4 Ves. 610; *Gordon v. Lord Reay*, 5 Sim. 274; *Aaron v. Aaron*, 3 De G. & Sm. 475.

But if the testator expressly distinguishes between will and codicil the will must mean the will proper : *Bunny v. Bunny*, 3 B. 109 ; *Pratt v. Pratt*, 14 Sim. 129 ; *Farrer v. St. Catherine's Coll.*, 16 Eq. 19.

So, too, a reference to a will of a particular date does not include a codicil of different date. *Burton v. Newbery*, 1 Ch. D. 234.

It would seem that the term messuage or house would include a garden : *Carden v. Tuck*, Cro. El. 89, 3 Leon. 214, pl. 283 ; *Lombe v. Stoughton*, 18 L. J. Ch. 400 ; but not land contiguous to or enjoyed with the house : *Roe d. Walker v. Walker*, 3 B. & P. 875.

House or
messuage.

A gift of a house with its appurtenances will pass everything naturally belonging to the enjoyment of the house, such as a garden or orchard. *Boocher v. Samford*, Cro. El. 113 ; *Doe d. Lemprière v. Martin*, 2 W. Bl. 1148 ; *Buck d. Whalley v. Nurton*, 1 B. & P. 58.

Appurte-
nances.

But land will not pass as appurtenant to a house or to other lands. See Plowd. 169 a. 170, Co. Lit. 121 b. ; *Hearn v. Allen*, Cro. Car. 57 ; *Lister v. Pickford*, 34 B. 576.

A gift of the use and occupation of a house does not involve a personal use so as to prevent the donee from letting. *Rabbeth v. Squire*, 4 De G. & J. 406. *Manison v. Jones* 14 Q. B. 456

Use and
occupation.

But a gift over, if the donee ceases to occupy the house, shows that the testator contemplated a personal use. *Maclaren v. Stainton*, 27 L. J. Ch. 442 ; 4 Jur. N. S. 199.

A devise of a house as occupied by A. will not pass a merely occasional easement enjoyed by A. over other property of the testator : *Polden v. Bastard*, L. R. 1 Q. B. 156 ; though the words as enjoyed by A. might : *Bodenham v. Pritchard*, 1 B. & C. 350.

Devise of a
house as
occupied
by A.

The proper legal meaning of "the premises" is *præ-* Premises.

missa, but it may be used in a popular sense as a description of certain property, as in the phrase house and premises; but in such a case it will only include property in connection with the particular property mentioned. *Lethbridge v. Lethbridge*, 3 D. F. & J. 523, 4 *ib.* 35; *Read v. Read*, 15 W. R. 165.

II. WORDS APPROPRIATE TO REALTY AND PERSONALTY RESPECTIVELY.

Under the words *personal* property, estate and effects, personal property alone passes. *Belaney v. Belaney*, L. R. 2 Eq. 210, 2 Ch. 138.

Words estate or property alone will pass realty,

1. The words estate or property alone are, however, sufficient to carry real estate. *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 76, 11 Jur. 193; *Hawksworth v. Hawksworth*, 27 B. 1.

where coupled with other words.

Where these words are coupled with other words which would alone be sufficient to carry the whole of the personal property, the word estate will, *prima facie*, carry realty, as it would otherwise be insensible. *Tilley v. Simpson*, 2 T. R. 659 *n.*; *Edwards v. Barnes*, 2 Bing. N. C. 252; *Doe d. Walls v. Langlands*, 14 East, 370; *Jongsma v. Jongsma*, 1 Cox, 362; *Patterson v. Huddart*, 17 B. 210; *Hamilton v. Buckmaster*, L. R. 3 Eq. 323; *Sanderson v. Dobson*, 7 C. B. 81, and 10 B. 47, overruling same case, 1 Ex. 141; and see *Dobson v. Bowness*, 5 Eq. 404; *Loftus v. Stoney*, 17 Ir. Ch. 178.

And if there are any words in the gift accurately applicable to realty, such as “devise,” the fact that the trusts declared are only applicable to personalty will not prevent the real estate from passing. *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223; *Dunnage v. White*, 1 J. & W. 583; *Stokes v. Salomons*, 9 Ha. 75; *Lloyd v. Lloyd*, 7 Eq. 458; *Longley v. Longley*, 13 Eq. 133.

And real estate will pass even if there are no words technically appropriate, and the trusts declared are not literally applicable to realty, if they can be held popularly applicable. *Saumarez v. Saumarez*, 4 M. & Cr. 331; *D'Almaine v. Moseley*, 1 Drew. 632; *Morison v. Hoppe*, De G. & Sm. 234.

Thus the words "collect and get in" will not prevent realty from passing. *Hamilton v. Buckmaster*, L. R. 8 Eq. 323.

So, too, if the trust is for sale or investment, the inapplicability of the subsequent trusts to realty is immaterial. *O'Toole v. Browne*, 3 E. & B. 572; *Streatfield v. Cooper*, 27 B. 338; *Fullerton v. Martin*, 22 L. J. Ch. 893; *Dobson v. Bowness*, 5 Eq. 404. See, too, *Affleck v. James*, 17 Sim. 121.

If, however, the gift is to trustees, their executors, administrators and assigns, on trusts exclusively applicable to personalty, real estate will not pass. *Doe d. Spearing v. Buckner*, 6 T. R. 610; *Pogson v. Thomas*, 6 Bing. N. C. 337; *Coard v. Holderness*, 20 B. 147.

It has sometimes been said, that if the words with which the word "estate" is coupled are not sufficient to carry all the personal property, estate will be confined to personalty. See *Tilley v. Simpson*, 2 T. R. 659 n.; *D'Almaine v. Moseley*, 1 Dr. 632. The rule appears, however, to be unsupported by actual decision, and has been disapproved of. See *Loftus v. Stoney*, 17 Ir. Ch. 178.

At any rate, where there is a prior devise of lands a gift of the "rest and residue of my estate," or "all other my estate," though coupled with words which would not alone carry all the personalty, will carry realty. *Scott v. Alberry*, Com. 337, 8 Vin. Abr. 229, pl. 14; *Fletcher v. Smiton*, 2 T. R. 656.

Of course where the testator shows that he uses the word estate as equivalent to effects, only personalty will

pass. *Timewell v. Perkins*, 2 Atk. 102; *Doe d. Hurrell v. Hurrell*, 5 B. & Ald. 18.

What I may
die pos-
sessed of.

2. The words "whatever I may die possessed of" will carry realty.

It makes no difference that the person to whom the gift is made is also appointed executor. *Pitman v. Stevens*, 15 East, 505; *Wilce v. Wilce*, 5 M. & P. 682, 7 Bing. 664; *Thomas v. Phelps*, 4 Russ. 348.

Though, on the other hand, these words may be controlled by being coupled with personalty. *Monk v. Maundesley*, 1 Sim. 286; *Cook v. Jaggard*, L. R. 1 Ex. 125.

All the
rest.

So the words "all the rest," though following gifts of personalty, will pass realty. *Atree v. Atree*, 11 Eq. 280.

Effects.

3. The word effects *primâ facie* will not pass real estate: *Doe v. Dring*, 2 Mau. & S. 448; *Doe d. Haw v. Earles*, 15 M. & W. 450, unless the testator shows that he has used it in an inaccurate sense: *Marquis of Titchfield v. Horncastle*, 2 Jur. 610; *Melsome v. Long*, 3 Jur. N. S. 1078; but effects both real and personal will. *Hogan v. Jackson*, 3 B. P. C. 388, Cowp. 299.

Chattels.

4. On the other hand, chattels real and personal, *primâ facie* will not, unless explained by the context. *Grayson v. Atkinson*, 1 Wils. 333.

CHAPTER X.

THE EFFECT OF A DEVISE IN GENERAL TERMS.

I. FREEHOLDS.

IN wills, prior to the Wills Act, a residuary devise included only lands possessed by the testator at the date of his will, and of which he had not attempted to make any disposition by his will.

Operation of a general devise on freeholds before the Wills Act.

It included, therefore, the reversion in lands in which partial interests only had been previously given. *Rooke v. Rooke*, 2 Vern. 461, 1 Eq. Ab. 210, pl. 17; *White v. Vitty*, 2 Russ. 484, 4 Russ. 584.

And in the case of contingent and executory devises it included the interest undisposed of in the event of those devises not taking effect: *Doe d. Wells v. Scott*, 3 Mau. & S. 300; or until they take effect: *Egerton v. Massey*, 3 C. B. N. S. 338; but not lapsed or void devises.

Now by the 25th section of the Wills Act, real estate comprised in any devise which shall fail or be void shall be included in a residuary devise.

Effect of the Wills Act is to make the will speak from the death.

And by the 24th section every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A contrary intention is not sufficiently manifested by a gift of the freehold, "to which I *am* entitled," though there may be a subsequent devise of copyholds "to which I am

What is a contrary intention.

or at the time of my death shall be entitled." *Ld. Lilford v. Powys Keck*, 30 B. 300.

Use of the
word
"now."

Nor is the word "now" alone sufficient to restrict the bequest. *Wagstaff v. Wagstaff*, 8 Eq. 229; *Hepburn v. Skirving*, 4 Jur. N. S. 651.

But if the testator expressly distinguishes between the two periods by giving such freeholds and leaseholds as are now vested in me, "or as to the said leasehold premises as shall be vested in me at the time of my death," the word now must be referred to the date of the will. *Cole v. Scott*, 1 Mac. & G. 518, 1 H. & T. 477. See p. 23, *ante*.

II. REVERSIONS.

Reversions
pass under
a general
devise.

1. Reversions, whether vested in the testator at the time of making his will or remaining in him after the limitations of his will are exhausted, pass by a general devise of lands. *Chester v. Chester*, 3 P. W. 56; *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Mostyn v. Champneys*, 1 Scott, 293, 1 Bing. N. C. 341.

Devise of
lands not
settled
includes a
reversion
in settled
lands.

2. And a devise of lands not settled, or out of settlement, is equivalent to a devise of lands not otherwise disposed of, over which the testator has absolute dominion, and will therefore pass a reversion in fee in settled lands. *Incorporated Society v. Richards*, 1 Dr. & War. 258; *Chester v. Chester*, 3 P. W. 56; *A.-G. v. Vigors*, 8 Ves. 256; *Jones v. Skinner*, 5 L. J. Ch. 87.

A charge of annuities upon the lands passing by the general words will not exclude reversions. *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Doe d. Pell v. Jeyes*, 1 B. & Ad. 593.

Though
some of
the limita-
tions are
inapprop-
riate to
the rever-
sion.

3. The fact that the limitations on which the reversion is dependent are such that some of the limitations of the will cannot take effect upon the reversion, will not prevent the reversion from passing.

If there are other lands besides the reversion the limitations inapplicable to the reversion will be referred to the other lands *reddendo singula singulis*. *Doe d. Earl Cholmondeley v. Weatherby*, 11 East, 322; *William d. Hughes v. Thomas*, 12 East, 141; *Freeman v. Duke of Chandos*, Cowp. 363; *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492; *Morris v. Lloyd*, 33 L. J. Ex. 202.

And under this head would come all wills since the Wills Act, where such of the limitations as can never take effect upon the reversion may be looked upon as intended to operate upon after-acquired lands.

And even if there are no other lands the reversion will pass if some of the limitations of the will are applicable to it. *Church v. Mundy*, 12 Ves. 426; *Tennent v. Tennent*, Dru. temp. Sugden, 161, 1 Jo. & Lat. 379; *Ford v. Ford*, 6 Ha. 486; *Roe d. James v. Avis*, 4 T. R. 605. *Goodtitle d. Daniel v. Miles*, 6 East, 494, must be considered overruled.

4. If, however, none of the limitations of the will could take effect upon the reversion, there seems no reason for supposing the reversion would pass: *Tennent v. Tennent*, *supra*, is not *contra*, since the devise of the reversion was capable of taking effect so far as the life interest given to R. was concerned. *Goodtitle d. Daniel v. Miles*, *supra*, seems to have been decided upon this principle, though the facts did not justify its application.

Whether a reversion passes if all the limitations are inappropriate.

5. And, of course, the reversion will not pass if the testator expressly treats it as undisposed of by his will; if, for instance, he treats the estates in which he has a reversion as descendible on failure of the prior limitations. *Strong v. Teatt*, 2 Burr. 912, 3 B. P. C. 219.

III. LEASEHOLDS FOR LIVES.

The same rules are applicable to leaseholds for lives, which, being freehold interests, pass under a

Leaseholds for lives.

general devise though some of the limitations are inapplicable. *Fitzroy v. Howard*, 3 Russ. 225; *Weigall v. Broome*, 6 Sim. 99.

IV. COPYHOLDS.

Copyholds. By the statute 55 Geo. 3, c. 192, and sections 3 and 4 of the Wills Act, copyholds, whether surrendered to the use of the will or not, pass by a general devise. *Doe d. Clarke v. Ludlam*, 7 Bing. 275, 5 Moo. & P. 48.

The effect of section 3 of the Wills Act is only to dispense with the necessity for a surrender, and not to convey the estate into the devisee without admission. The estate therefore remains in the customary heir till admittance. *Garland v. Mead*, L. R. 6 Q. B. 441.

Equitable estates in copyholds. Before the statute of 55 Geo. 3, equitable estates of copyholds which could not be surrendered could be devised by words of direct reference: *Allen v. Poulton*, 1 Ves. sen. 121; but they did not pass by a general devise of lands; but now, as the evidence of intention to pass copyholds inferred from a surrender is unnecessary, it seems they would pass under a general devise. See, per Lord Cranworth, in *Torre v. Brown*, 5 H. L. 555, 574.

And by the effect of the 3rd section, a general devise of lands will pass copyholds, freed from the widow's right to freebench, as such right would have been barred prior to the passing of that section by a surrender. *Lacey v. Hill*, 19 Eq. 846.

V. LEASEHOLDS FOR YEARS.

Leaseholds for years where they passed before the Wills Act. A general devise of lands before the Wills Act does not carry leaseholds for years if there are any freeholds; on the other hand, if there are no freeholds, leaseholds may pass. *Rose v. Bartlett*, Cro. Car. 292;

Thompson v. Lawley, 2 B. & P. 303; *Gully v. Davis*, 10 Eq. 562.

Leaseholds will, however, pass under the description lands which the testator "then stood seised or possessed of, or in any way interested in." *Addis v. Clement*, 2 P. W. 456. Words of description applicable to leaseholds.

The word possessed is the important word, and leaseholds have been held not to pass under a similar devise without the word possessed. *Pistol v. Riccardson*, 2 P. W. 459 n.; *Davis v. Gibbs*, 3 P. W. 26.

The word farm will pass a leasehold as well as a freehold portion: *Lane v. Stanhope*, 6 T. R. 345; unless it is restricted by the addition of "all other my freehold lands." *Arkell v. Fletcher*, 10 Sim. 299. Farm.

So, too, land held on lease and attached to a freehold house, passes under "messuages or tenements with the appurtenances." *Hobson v. Blackburn*, 1 M. & K. 571; *Doe v. Martin*, 2 W. Bl. 1148.

And "leaseholds" pass where the devise is to certain persons to hold for ever, or otherwise according to the natures and tenures thereof: *Hartley v. Hurle*, 5 Ves. 540; *Swift v. Swift*, 1 D. F. & J. 160; or where the lands are described by acreage, which can only be satisfied by including leaseholds. *Goodman v. Edwards*, 2 M. & K. 759.

Since the Wills Act, however, leaseholds pass under a general devise of lands unless there is a contrary intention. Leaseholds pass under a general devise since the Wills Act.

Such a contrary intention is not shown by the fact that the "lands" in question are devised in strict settlement without any provision to prevent the leaseholds from vesting indefeasibly in the first tenant in tail at his birth. *Wilson v. Eden*, 11 B. 237, 5 Ex. 752, 14 B. 317, 18 Q. B. 474, 16 B. 153. Contrary intention.

But if there is a direction to accumulate the rents and

profits during the minority of a tenant for life or in tail, and if he attains twenty-one to pay the accumulations to him, or if he dies under twenty-one to invest them in freehold land, to be settled to the same uses—a direction inconsistent with the absolute vesting of the leaseholds in a tenant in tail at birth,—and a power of selling the “lands” and investing the proceeds in leaseholds, to be settled upon the same trusts, but so that they shall not vest in any tenant in tail dying under twenty-one, and there is a gift of the residuary personal estate upon trusts corresponding with the uses of the devised lands with the same proviso against absolute vesting, the testator by the provisions against the vesting of leaseholds in any tenant in tail dying under twenty-one shows that he would have inserted similar provisions in the devise of the “lands,” unless he had intended leaseholds not to pass under that name. *Prescott v. Barker*, L. R. 9 Ch. 174.

Leaseholds
will not
pass under
the term
freehold
lands or
real estate.

A devise of “freehold” lands, or of “real” estate is not affected by the 24th section of the Wills Act: *Stone v. Greening*, 13 Sim. 390; *Emuss v. Smith*, 2 De G. & Sm. 722; *Turner v. Turner*, 21 L. J. Ch. 843; and therefore leaseholds will only pass if there are no freeholds. *Day v. Trig*, 1 P. W. 286; *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1; *Gully v. Davis*, 10 Eq. 562.

In this respect the Wills Act, since which after-acquired freeholds might pass, will not prevent leaseholds from passing where there are no freeholds. *Nelson v. Hopkins*, 21 L. J. Ch. 410; *Gully v. Davis*, 10 Eq. 562.

And where a testator was possessed of a leasehold interest, and also of the reversion in fee from the expiration of three years after the end of the term in certain premises, the whole interest has been held to pass under the word freehold. *Matthews v. Matthews*, 4 Eq. 278.

VI. BENEFICIAL INTEREST IN A MORTGAGE.

A general devise of lands will not without more pass the beneficial interest in a mortgage. *Strode v. Russell*, 2 Vern. 621, 624; *Casborne v. Scarfe*, 1 Atk. 605; see 2 J. & W. 194. See *Martin d. Weston v. Mowlin*, 2 Burr. 969, where the testator was mortgagee in possession.

Beneficial
interest in
a mort-
gage.

Nor will a devise of lands by a particular description pass the beneficial interest in a mortgage of those lands if there is anything else to which the devise can apply; if, for instance, the testator was owner of the freehold and at the same time mortgagee of the lease of the land. *Bowen v. Barlow*, 11 Eq. 454, 8 Ch. 171.

But a devise of particular lands of which the testator is only mortgagee to several persons in succession, would, it seems, pass the beneficial interest, as something was clearly intended to pass, and the limitations are inappropriate to a devise of the mere legal estate. *Woodhouse v. Meredith*, 1 Mer. 450. See, too, *Knollys v. Shepherd*, 1 J. & W. 499; *Clarke v. Abbott*, Barn. Ch. 457, 461.

VII. TRUST AND MORTGAGE ESTATES.

A general devise to a person absolutely without more will pass the legal estate in property of which the testator is trustee or mortgagee. *Lord Braybroke v. Inskip*, 8 Ves. 417.

Legal es-
tate in
trust and
mortgage
estates.

There is, however, a distinction between cases where the testator is mortgagee in trust, and where he is also beneficially entitled to the mortgage money.

1. Where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal estate passes under a gift of "all the rest of my real and personal estate to A. for her own use and

Where the
testator is
mortgagee
and bene-
ficially en-
titled to

the mort-
gage
money.

benefit," though there may be a charge of debts. *Re Stevens' Will*, 6 Eq. 597. In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together.

But if the devise is to *trustees*, subject to a charge of debts, apparently the legal estate would not pass, the argument from the convenience of uniting the legal estate with the beneficial interest being away: *Re Horsfell*, M'C. & Y. 292; *a fortiori* where the devise is to trustees subject to the payment of debts upon trusts inapplicable to the legal estate. *Packman v. Moss*, 1 Ch. D. 215.

But if the trustees are directed to get in debts due on any security, they take the legal estate. *Re Arrowsmith's Trusts*, 6 W. R. 642.

The legal estate will not pass where the devise is after payment of debts to two persons as tenants in common. *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

Or where it is to several persons in definite shares, though not subject to debts. *Martin v. Laverton*, 9 Eq. 563.

Or even where it is to an indefinite class, as tenants in common. *Re Finney's Estate*, 3 Giff. 465.

Mere trust
estates.

2. Mere trust estates will not be prevented from passing under a general devise by words of benefit superadded. *Bainbridge v. Lord Ashburton*, 2 Y. & C. Ex. 347; *Sharpe v. Sharpe*, 12 Jur. 398; *Lewis v. Matthews*, L. R. 2 Eq. 177; and see *Ex parte Shaw*, 8 Sim. 159.

But they will not pass where there is a charge of debts. *Doe d. Reade v. Reade*, 8 T. R. 118; *Duke of Leeds v. Munday*, 3 Ves. 348; *Hope v. Liddell*, 21 B. 183. See, however, *Re Brown and Sibley*, 24 W. R. 782. *2 Ch. R. 156*

Nor where the devise is on trust for sale. *Ex parte Marshall*, 9 Sim. 555; *Re Cantley*, 17 Jur. 124; *Morley's Will*, 10 Ha. 298.

Nor where the devise is to uses in strict settlement. *Thompson v. Grant*, 4 Mad. 438.

As to whether a devise to the separate use will prevent trust estates from passing. See *Lindsell v. Thacker*, 12 Sim. 178.

3. Where a testator has contracted to sell real estate, so that he is a constructive trustee of the legal estate, it will pass under a devise of trust estates. *Lysaght v. Edwards*, 2 Ch. D. 499. *Purser v. Darby*, 4 K. & J. 41, only decides that where the estate contracted to be sold is specifically devised it is excepted from a general devise of trust estates. Constructive trust.

If there is no devise of trust estates, the legal estate in lands contracted to be sold will pass under a general devise of real and personal estate upon trust to get in and dispose of the personalty, the legal estate being required for the purpose of the trust. *Wall v. Bright*, 1 J. & W. 494; *Lysaght v. Edwards*, 2 Ch. D. 499, 515.

But it will not if the devise is to tenants in common with limitations over. *Thirtle v. Vaughan*, 24 L. T. 5.

VIII. THE OPERATION OF A GIFT IN GENERAL TERMS UPON POWERS.

In Wills before the Wills Act a general devise will not, as a rule, carry lands over which the testator has a general power of appointment. *Hoste v. Blackman*, 6 Mad. 190; *Roake v. Denn*, 4 Bl. N. S. 1. Effect of a general devise on powers before the Wills Act.

But the lands subject to the power will pass :

If there is a clear disposition of land, and the testator has at the time no other lands. *Standen v. Standen*, 2 Ves. jun. 589, 6 B. P. C. 193; *Denn v. Roake*, 6 Bing. 475, 5 B. & C. 732. As regards realty.

But there must be a clear disposition of lands, and not merely such general words as estate or property, though

they would be sufficient to pass the proper lands of the testator. *Jones v. Curry*, 1 Sw. 66; *Evans v. Evans*, 23 B. 1.

The land subject to the power is allowed to pass only in order to give effect to the words of the will, and not because the testator has shown an intention to execute the power, and therefore only so much of the land subject to the power will be allowed to pass as is sufficient to give effect to the words of the will. Thus, if a testator has freeholds and a power of appointment over freeholds and copyholds, a devise of his freeholds and copyholds will pass only the copyholds and not the freeholds subject to the power. *Lewis v. Llewellyn*, T. & R. 104; *Napier v. Napier*, 1 Sim. 28.

But a gift of real and personal estate where the testator has no real estate, but has a power of appointing real and personal estate, will pass both the real and personal estate subject to the power. *Standen v. Standen* 2 Ves. jun. 589, 6 B. P. C. 193.

Where a testator has power to devise lands, and, at the same time, of appointing a sum charged upon the land, a general devise, whether before or since the Wills Act, will not operate as an appointment of the sum so charged. *Clifford v. Clifford*, 9 Ha. 675.

As regards
personalty.

These rules are not applicable to personalty since, though the testator might not at the time of the bequest have possessed any property but that subject to the power which could have passed under the bequest, it would have been effectual with regard to after-acquired property.

Therefore, if there is at the testator's death any property upon which the words of general gift can take effect, the power will not be executed. *Jones v. Curry*, 1 Sw. 66; *Langham v. Nenny*, 3 Ves. 467; *Croft v. Slee*, 4 Ves. 60; *Bradley v. Westcott*, 13 Ves. 445; *Buckland v. Barton*, 2 H. Bl. 136; *Jones v. Tucker*, 2 Mer. 538.

If at his

It is also said that even if there be at the testator's

death no other property upon which the general words can operate, the power will nevertheless not be executed. In all the cases, however, cited in support of this proposition, there was some property besides that subject to the power. See *supra*. In *Jones v. Tucker, supra*, which goes nearest to the point, there were apparently arrears of rent due to the testatrix at the time of her death.

death the testator has no property but that subject to the power.

On the other hand, a power vested in a married woman has been held to be executed by a general gift in her will when there was nothing else at her death upon which the gift could operate (see *post*), and there seems to be no apparent reason why married women should in this respect differ from other persons.

With regard to realty, it is clear that where a married woman has a power to appoint realty, a general devise of her real and personal property will pass the estate subject to the power, there being nothing else upon which the devise can operate. *Curteis v. Kenrick*, 3 M. & W. 461, 9 Sim. 443; *Churchill v. Dibbin*, 9 Sim. 447 n.

Power vested in a married woman.

And where the property subject to the power is personalty, the cases go to this :

1. Where a married woman has a power of appointment, and no other property at the date of the will but at her death, there is some separate estate upon which the will can operate—a general gift will not execute the power. *Lovell v. Knight*, 2 Sim. 275 affirmed on appeal. *Lemprière v. Valpy*, 5 Sim. 108; *Evans v. Evans*, 23 B. 1.

2. But if at her death there is nothing upon which the will can take effect, the power will be executed. *Shelford v. Acland*, 23 B. 10, where, however, the will was since the Wills Act. *A.-G. v. Wilkinson*, L. R. 2 Eq. 816. But *qu.* whether this would be the case with the will of a testator; see *supra*.

With regard to personalty, therefore, as also to realty, In wills

before the Wills Act, and in all cases of special powers, there must be a reference to the power or to the property subject to the power.

where the case is not within the exception above mentioned, in wills before the Wills Act in order to execute a general power, there must be a reference either to the power or to the property subject to the power.

And the same is the case with special powers, whether before or since the Wills Act. *Wildbore v. Gregory*, 12 Eq. 482; *Harvey v. Harvey*, 23 W. R. 478.

Where the power is referred to, and only a portion of the fund subject to the power is specifically given, the rest will pass under a general gift of the residue. *Re Comber's Trust*, 14 W. R. 172.

What is a sufficient reference to a power.

1. What is a sufficient reference to a power.

A ratification of the trusts of the settlement creating a power is no evidence of an intention to execute the power. *Re Bingloe's Trust*, 26 L. T. N. S. 58.

General powers.

Probably words referring to property over which the testator has any "disposing power," would be sufficient to execute a general power of appointment. See *Thornton v. Thornton*, 20 Eq. 599; *Cooke v. Cunliffe*, 17 Q. B. 245.

Special powers.

But if the power is a special power, where there are words large enough to include everything belonging to the testator, the additional words "or over which I have any power of disposition or control," may be referred to a special power if all the objects of the power are included in the gift, though the interest given may be larger than the power justifies, or though persons not objects of the power may be included in the gift. *Pidgely v. Pidgely*, 1 Coll. 255. *In re Teape's Trusts*, 16 Eq. 442; see *Bruce v. Bruce*, 11 Eq. 371; *Bulteel v. Plummer*, 6 Ch. 160.

Power created after the date of the will.

This, however, does not apply to a power created after the date of the will, though the will may be subsequently republished. *Hope v. Hope*, 5 Giff. 13.

Use of the

When there is a reference to the power either in direct

terms or because there is nothing else to which the testator's words can apply, the fact that the property is described as "my property" will not exclude the property subject to the power from passing. *Harvey v. Stracey*, 1 Dr. 73, 115; *Bailey v. Lloyd*, 5 Russ. 380.

words "my property."

Nor will the fact that the bequest is made subject to the testator's debts, though the power may be a special power, where there is other property to which the charge of debts can apply. *Bailey v. Lloyd*, 5 Russ. 380; *Cowx v. Foster*, 1 J. & H. 80; *Ferrier v. Jay*, 10 Eq. 550; *In re Teape's Trusts*, 16 Eq. 442. *Clogstoun v. Walcott*, 13 Sim. 523, is no longer law.

Effect of a charge of debts.

Whether a gift of property "over which I have any disposing power" without more will include property over which the testator has a special power of appointment seems doubtful.

Whether gift of property "over which I have any disposing power" executes a special power.

It will not if there is an intention not to execute the power. *Cooke v. Cunliffe*, 17 Q. B. 245.

In *Thornton v. Thornton*, 20 Eq. 599, a gift of "all my property over which I have any disposing power" to the testator's wife for life and then to his children, and in default of children to his wife's brothers and sisters, was held, *reddendo singula singulis*, to execute two powers of appointment—one in favour of the testator's wife, the other of his children.

And where under a non-exclusive power exercised prior to the passing of the statute, 37 & 38 Vict. c. 37, the testatrix gave legacies to three of the objects of the power, and then gave all the residue of her property of whatever kind, and over which she had any power of appointment, to the other objects of the power, the power was held well executed, the legacies to the objects of the power being charged on the residue. *Gainsford v. Dunn*, 17 Eq. 405.

Gift of legacies to objects of the power charged upon the fund subject to the power is an appointment *pro tanto*.

So, too, where legacies are given to the objects of a

power and the fund is then appointed to a person not an object of the power, subject to the legacies, the gift of the legacies operates as an appointment *pro tanto*. *Disney v. Crosse*, L. R. 2 Eq. 592.

What is a sufficient reference to property subject to a power.

There must be a reference to a specific fund.

2. Or again, a reference to the property subject to the power without reference to the power is sufficient to show an intention to execute the power.

But there must be no doubt on the face of the will that the testator is referring to some specific fund in existence at the time of making the will.

Therefore, the fact that property of the same kind as that subject to the power is given merely in general terms—as, for instance, some particular kind of stock will not execute the power since the gift would be satisfied by purchasing the stock in question. *Webb v. Honnor*, 1 J. & W. 352; *Mattingley's Trusts*, 2 J. & H. 427.

Nor will the fact that legacies are given equal in amount to the fund subject to the power. *Jones v. Tucker*, 2 Mer. 533; *Davies v. Thorns*, 3 De G. & S. 347. *Forbes v. Ball*, 3 Mer. 437, is explained in *Davies v. Thorns*.

Nor that legacies largely in excess of the testator's estate unless the property subject to the power is included in it are given. *Lowe v. Pennington*, 10 L. J. Ch. 83.

And the bequest of certain specific articles subject to the power will not be sufficient to make the rest of the property subject to the power pass by general words. *Hughes v. Turner*, 3 M. & K. 666.

On the other hand where the testator uses words showing that he is disposing of a specific fund, the power will be executed. *Lowndes v. Lowndes*, 1 Y. & J. 445; *Sayer v. Sayer*, 7 Ha. 381; 3 Mac. & G. 607; *Rooke v. Rooke*, 2 Dr. & S. 38; *David's Trusts*, Johns. 495; *Gratwicke's Trusts*, L. R. 1 Eq. 176.

And this is the case though some of the persons in

whose favour the power is exercised are incapable of taking. *Gratwicke's Trusts, sup.*

And where a specific fund is referred to, the fact that the fund subject to the power is misdescribed, makes no difference. *Mackinley v. Sison*, 8 Sim. 561.

In the same way where a portion of the property subject to the power is excepted out of a general gift, the rest of the property subject to the power passes. *Walter v. Mackie*, 4 Russ. 76; *Reid v. Reid*, 25 B. 469.

And where the power was a special power and the testator gave legacies out of the funds subject to the power, and then gave the residue of his property "after payment of the legacies" to the objects of the power, the residue was held to include the property subject to the power. *Elliott v. Elliott*, 15 Sim. 321.

But a mere gift of the "residue of my personal estate and effects" to an object of the power would not have this effect. *Butler v. Gray*, 5 Ch. 26.

Now, by sec. 27 of the Wills Act a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend over which he has a general power of appointment, unless a contrary intention shall appear by the will.

Effect of
the 27th
sect. of the
Wills Act
on general
powers.

A power to appoint by will only is a general power within the section. *Re Powell's Trust*, 18 W. R. 228.

Special powers are of course not within the section. *Wildbore v. Gregory*, 12 Eq. 482.

A contrary intention is not indicated by an express confirmation of the trusts of the instrument creating the power where there is anything to which such confirmation can apply; as, for instance, other settled property or prior trusts of the property over which the testator

Contrary
intention.

has the power, though the property may be disposed of in default of appointment. *Lake v. Currie*, 2 D. M. & G. 586; *Hutchin v. Osborne*, 4 K. & J. 252; 3 De G. & J. 142.

Nor by the fact that a life interest is given to a person when, if that person survives the testator, the power will be gone. *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63.

But it has been held that a gift of property "not otherwise disposed of" does not execute a power where the property subject to the power is disposed of in default of appointment. *Moss v. Harter*, 3 Sm. & G. 458, *sed qu.*; see *Bush v. Cowan*, 9 Jur. N. S. 429; 11 W. R. 395.

Effect of a general bequest upon powers.

By the same section a general bequest of personalty operates as an exercise of a general power of appointment of which the testator is the donee.

This applies as well to a general residuary bequest (*Spooner's Trust*, 2 Sim. N. S. 129; *Clifford v. Clifford*, 9 Ha. 675; *A. G. v. Brackenbury*, 1 H. & C. 782), as to a gift of a general pecuniary legacy. *Hawthorn v. Sheddon*, 3 Sm. & G. 293; *Shelford v. Acland*, 23 B. 10; *Re Wilkinson*, 4 Ch. 587.

Effect upon a general power of a direction to pay debts.

A direction to executors to pay the testator's debts out of his personal estate operates as an execution of a general power in favour of the executor. *Wilday v. Barnett*, 6 Eq. 193. So would a simple direction to pay debts without the appointment of an executor. *Laing v. Cowan*, 24 B. 112. But the mere appointment of an executor would probably not be enough. *Per Wickens, V.-C., In re Davies' Trusts*, 13 Eq. 166. *also 32 Ch. D. 508*

Whether a power can be exercised by a will made previous to the instrument creating the power.

It seems that by the combined effect of sections 24 and 27, a general power may be exercised by a general gift in a will made prior to the instrument creating the power.

At any rate, this is the case where the power being created by the testator the previous will expressly gives

all property over which the testator has any power. *Patch v. Shore*, 2 Dr. & Sm. 589.

Or where the will expressly refers to the property which is afterwards settled by the testator who reserves to himself a power. *Stillman v. Weedon*, 16 Sim. 26 ; *Meredyth v. Meredyth*, I. R. 5 Eq. 565 ; *Cofield v. Pollard*, 3 Jur. N. S. 1203.

The same is the case where the power, though existing at the date of the will, is then only contingent, being given to the survivor of two persons of whom the testator is one. *Thomas v. Jones*, 2 J. & H. 475 ; 1 D. J. & S. 63. See pp. 5, 6, *ante*.

It does not appear to have been decided that a mere general gift will execute a power subsequently given to the testator by third persons, though it would seem to follow upon principle.

But this does not apply to a power given to the testator by the will of a person who survives him. *Jones v. Southall*, 32 B. 31.

And where the settlor and testator were the same person and the power was to be executed by a last will, and the testator made a will before and after the creation of the power, the latter purporting to be his last will, it was held that the first will was not meant to be an execution of the power. *Pettinger v. Ambler*, L. R. 1 Eq. 510.

And where the will, if treated as an execution of a power in a subsequent settlement, would have the effect of making the whole settlement nugatory, the whole settlement being subject to a general power of appointment by the testator, there is sufficient evidence of intention to except the property from the operation of the will. *Ruding's Settlement*, 14 Eq. 266.

An appointment to executors of a fund over which the testator has a general power takes the fund away from the donees in default of appointment, though some of the

In what cases a general gift by will will not execute a power subsequently created.

Whether an appointment takes the fund from the

donees in
default of
appoint-
ment in all
events.

trusts declared by the testator may fail or trusts only exhausting part of the fund are declared. *Chamberlain v. Hutchinson*, 22 B. 444; *Keowns' Estate*, I. R. 1 Eq. 372; *Brickenden v. Williams*, 7 Eq. 310; *Wilkinson v. Schneider*, 9 Eq. 423; *Scriven v. Sandom*, 2 J. & H. 743; see *Hayes v. Oatley*, 14 Eq. 1.

But a mere direction to pay debts will only operate as an execution of the power *pro tanto*, and will not make the property subject to the power part of the testator's general estate. *Laing v. Cowan*, 24 B. 112.

And the testator may show that he did not intend to make the fund part of his general estate. Thus, where the testatrix was a married woman separated from her husband, an appointment to trustees was held not to make the fund part of her estate, as it would in that case have vested absolutely in her husband, since being married she could only dispose of it under the power, and therefore all subsequent dispositions of it as her absolute property would have been void. *Hoare v. Osborne*, 12 W. R. 661; 33 L. J. Ch. 586; 10 Jur. N. S. 694.

And in *Easum v. Appleford*, 5 M. & Cr. 56, the decision proceeded on the ground that the testatrix distinguished between her own property and that subject to the power, and at the same time intended to leave nothing undisposed of.

And where a testator bequeathed a leasehold estate upon the same trusts as his wife should declare with respect to her residuary personal estate, and in default of any disposition by his wife of her residuary personal estate, or so far as the same should not extend upon other trusts, and the bequest by the wife of her residuary personal estate failed as to two-thirds, the leasehold estate as to two-thirds went as in default of appointment. *Bristow v. Shirrow*, 10 Eq. 1.

And it seems a gift of residue directly to a donee, and

not through the medium of a trust which, under the 27th section, operates as an appointment, will not take the fund subject to the power from the donee in default of appointment where the residuary gift lapses. *Re Davies' Trusts*, 13 Eq. 163; see, too, *Biddulph v. Williams*, 1 Ch. D. 203.

A charge upon particular lands in favour of certain persons expressed by the testator to be made by virtue of a particular power, and of all other powers enabling him, will operate by way of devise upon such interest as the testator has if the power is no longer subsisting at his death. *Sing v. Leslie*, 2 H. & M. 68.

An appointment may take effect by way of devise.

CHAPTER XI.

RESIDUARY BEQUESTS.

I. WHAT IS A RESIDUARY GIFT.

No particular words necessary to pass the residue.

SUCH words as goods, chattels, or effects will, as a rule, pass the residuary personalty; no particular words are, however, necessary for that purpose. *Bland v. Lamb*, 2 J. & W. 399; *Hearne v. Wigginton*, 6 Mad. 120; *Fleming v. Burrows*, 1 Russ. 276; *Leighton v. Baillie*, 3 M. & K. 267; *Bassett's Estate*, 14 Eq. 54.

Doctrine of *ejusdem generis*.

The question frequently arises whether words in themselves large enough to pass the residue, but coupled with an enumeration of particular things will be cut down to pass only things *ejusdem generis* with those enumerated.

Enumeration of particulars followed by *et cætera*.

When there is an enumeration of particular things followed by *et cætera* only things *ejusdem generis* will be held to pass. *Marquis of Hertford v. Lowther*, 7 B. 1; *Newman v. Newman*, 26 B. 220; *Barnaby v. Tassell*, 11 Eq. 363.

Large words followed by an enumeration of particulars.

On the other hand where there are comprehensive words followed by an enumeration of particulars, an *et cætera* will not restrict the meaning of the large words. *Kendall v. Kendall*, 4 Russ. 360; *Gover v. Daviss*, 29 B. 222.

And generally it may be laid down large words such as goods, chattels, or effects, when they are followed by an enumeration of particulars will not be limited to things

ejusdem generis. *Fisher v. Hepburn*, 14 B. 627; *Patterson v. Huddart*, 17 B. 210; *Ellis v. Selby*, 7 Sim. 352; 1 M. & Cr. 286; *Swinfen v. Swinfen*, 29 B. 207; *Avison v. Simpson*, Jo. 43.

The same is the case though the particulars are introduced by such words as "namely," "consisting in," or "together with," or similar words. *Gower v. Davis*, 29 B. 222. In the goods of *Goodyear*, 1 Sw. & Tr. 127; 4 Jur. N. S. 1243; *Mahoney v. Donovan*, 14 Ir. Ch. 262, 388; *Drake v. Martin*, 23 B. 89; *Dean v. Gibson*, 3 Eq. 713; *Maberley's Trusts*, 19 W. R. 522; see *Kendall's Trust*, 14 B. 608.

And the words "whether in money or in the public funds or other securities of any sort or kind whatsoever," have an enlarging rather than a restrictive force, so far as personal property is concerned: *Cambridge v. Rous*, 8 Ves. 14; though apparently they would confine the residue to personalty to the exclusion of realty. See *Mullaly v. Walsh*, 1 R. 6 Eq. 227.

On the other hand if the particulars are added as a limitation of the large words, they will be confined to things *ejusdem generis*; *Timewell v. Perkins*, 2 Atk. 103; where the words were whatever I shall have at my death, as plate, jewels, linen, household goods, coach and horses. See *Wylie v. Wylie*, 1 D. F. & J. 410; 29 L. J. Ch. 341; 6 Jur. N. S. 259.

And it seems that the express inclusion in the large words of some particular property which would have passed without being expressly included, affords an argument for excluding from the gift things *ejusdem generis* with that included. *Steignes v. Steignes*, Mos. 296.

General words following an enumeration of particulars will *prima facie* have their full force whether introduced by the word "other" or not, if a restricted construction would cause an intestacy. *Arnold v. Arnold*, 2 M. & K.

Express inclusion of things which would have passed without mention.

Enumeration of particulars preceding large words will not restrict the latter.

365 ; *Swinfen v. Swinfen*, 29 B. 207 ; *Campbell v. Prescott*, 15 Ves. 503 ; *Michell v. Michell*, 5 Mad. 69 ; *Martin v. Glover*, 1 Coll. 269 ; *Parker v. Marchant*, 1 Y. & C. C. 290 ; *Nugee v. Chapman*, 29 B. 290 ; see too *Re Lloyds' Estate*, 2 Jur. N. S. 539 ; *Everall v. Browne*, 1 Sm. & G. 368.

It is immaterial that certain things which would have passed under the previous words, if read in their large sense, are subsequently given to the same legatee. *Bennett v. Batchelor*, 1 Ves. jun. 63 ; 3 B. C. C. 27 ; *Fleming v. Burrows*, 1 Russ. 276.

It makes no difference that the gift is not strictly residuary so that there might possibly be property which it would be ineffectual to pass. *Hodgson v. Jex*, 2 Ch. D. 122.

The word article, however, has not the same large sense as goods or effects. *Collier v. Squire*, 3 Russ. 467.

Large words confined to things *ejusdem generis*.

But if it is clear that the gift was not meant to be residuary, and the large words if not confined to things *ejusdem generis* would carry the residue, they must be so confined.

If there is another residuary gift,

This is the case if there is an express residuary gift. *Woolcomb v. Woolcomb*, 3 P. W. 112 ; *Stuart v. Marquis of Bute*, 1 Dow. 84 ; *Lamphier v. Despard*, 2 Dr. & War. 59 ; *Mullins v. Smith*, 1 Dr. & Sm. 204 ; *Campbell v. M'Graine*, 1 R. 9 Eq. 397 ; *Waite v. Morland*, 13 W. R. 963 ; *Smith v. Davis*, 14 W. R. 942.

Or it is clear that the gift in question was not meant to be residuary.

So when the residue has been given and the will is then revoked so far as relates to the bequest to the residuary legatee of the testatrix's plate, linen, household goods, and other effects, these words would be confined to things *ejusdem generis*. *Hotham v. Sutton*, 15 Ves. 319.

If, however, the revocation is of the same enumerated things and "other effects (except money)" the testatrix shows that she considered things not *ejusdem generis* would be included and the large words will have their full

force. *Hotham v. Sutton*, 15 Ves. 326; *Iverson v. Gassiot*, 3 D. M. & G. 958; see *Steignes v. Steignes*, Mos. 296. *Fleming v. Brook*, 1 Sch. & Lef. 318, is inconsistent with *Hotham v. Sutton*.

So, too, if something stated to be a portion of certain specific property together with the testator's household furniture and effects of what nature or kind soever is given to a legatee, and the testator then makes other gifts, the earlier gifts being clearly not residuary will only pass things *ejusdem generis* with those enumerated. *Rawlings v. Jennings*, 13 Ves. 39.

And it would seem that where there is a gift of certain articles and all other goods of whatever kind to a legatee at the commencement of a will, followed by dispositions of other portions of the testator's property, and the remainder of the latter property is given to the same legatee, it is clear that the first gift was not meant to be residuary. *Wrench v. Jutting*, 3 B. 521.

So, too, a gift of the remainder of the testator's money and effects to be expended in purchasing a suitable present for his godson must be read as limited to things *ejusdem generis* with money. *Borton v. Dunbar*, 1 Giff. 221; 2 D. F. & J. 338; 30 L. J. Ch. 8.

Or again, the testator may show by subsequent reference or explanation that he meant only things *ejusdem generis* to pass. *Sutton v. Sharp*, 1 Russ. 149; see *A. G. Wiltshire*, 16 Sim. 38.

So, too, if the gift is of other the goods and chattels in or about the testator's house following upon an enumeration of particular things, the words will be confined to things *ejusdem generis*, at any rate, if there is anything to show that the testator contemplated a continuous enjoyment by the legatee of the things with the house. *Trafford v. Berrige*, 1 Eq. Ab. 201, pl. 4; *Boon v. Cornforth*, 2 Ves. sen. 278; *Gibbs v. Lawrence*, 7 Jur. N. S.

Gift of things in a house confined to things *ejusdem generis* with those enumerated.

137; 30 L. J. Ch. 171; *Bradish v. Ellames*, 13 W. R. 128; 10 Jur. N. S. 1170, 1231.

And this construction is assisted if the things given are annexed to the house as heirlooms, a term implying durability. *Hare v. Pryce*, 12 W. R. 1072.

And in a similar gift the fact that a pecuniary legacy is given to the same legatee will prevent money in the house from passing as goods and chattels. *Roberts v. Kuffin*, 2 Atk. 113; *Anon. Prec. Ch.* 8.

Choses in action will not pass under a gift of chattels in a house.

Choses in action will not pass under a bequest of goods and chattels in a particular locality, being considered not property in the place, but evidence of property elsewhere. *Green v. Symonds*, 1 B. C. C. 129; *Lady Aylesbury's Case*, 11 Ves. 662; *Chapman v. Hart*, 1 Ves. sen. 271; *Moore v. Moore*, 1 B. C. C. 127; *Fleming v. Brook*, 1 Sch. & Lef. 318; *Brooke v. Turner*, 7 Sim. 671; *Hertford v. Lowther*, 7 B. 1.

Bank notes, however, will pass. *Popham v. Lady Aylesbury*, Amb. 68; *Brooke v. Turner*, *supra*.

A gift of property in a county will pass debts due from persons living in the county. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613.

II. WHAT PASSES UNDER A RESIDUARY GIFT.

What passes by a residuary gift.

A residuary gift passes everything not disposed of whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event. *Bernard v. Minshull*, Johns. 276. It also passes property attempted to be appointed. *Spooner's Trust*, 2 Sim. N. S. 129.

And it seems that a gift of residue "not otherwise disposed of" would be held to mean not otherwise effectually disposed of. *Green v. Dunn*, 20 B. 6; *De Trafford v. Tempest*, 21 B. 564.

And a residuary gift has even been held to include property directed to be considered as part of the testator's personal estate, and to go in a due course of administration. *Scott v. Moore*, 14 Sim. 35.

But the testator may show an intention not to include certain property in the residue by reciting, for instance, that it is settled in a particular manner, though it may not be so settled: *Circuitt v. Perry*, 23 B. 275; *Harris v. Harris*, 1. R. 3 Eq. 610; *Hawkes v. Longridge*, 29 L. T. 449; or by a declaration that he intends to dispose of it by a codicil, though he does not in fact do so. *Davers v. Dewes*, 3 P. W. 40; see, too, *Atherton v. Langford*, 25 B. 5.

Intention to exclude certain property from the residue.

And where the residue is given, *except* a certain sum which is given to a legatee, who dies before the testator, the exception falls into the residue. *Thompson v. White-lock*, 7 W. R. 625; 4 De G. & J. 490.

Exception for a particular purpose.

And where the residue is given generally and something is excepted for the purpose of excluding it from a trust for sale or some similar purpose, it will pass. *James v. Irving*, 10 B. 276; *Dobson v. Banks*, 32 B. 259.

In some cases the question has arisen whether a gift of a residue is a gift of the general residue or only of the residue of a particular fund. See *Ommaney v. Butcher*, T. & R. 260; *Legge v. Asgill*, *ib.* 265 n.; *Wrench v. Jutting*, 3 B. 521; *Bays v. Morgan*, 9 Sim. 289, 3 M. & Cr. 661; *Markham v. Ivatt*, 20 B. 579.

General residue and residue of a particular fund.

Where the gift of the residue of a particular fund is not specific, it will include legacies given out of the fund which lapse. *De Trafford v. Tempest*, 21 B. 564.

Again a gift of residue may in effect be specific.

If, for instance, the testator disposes of part of his land in H. to A., part to B., and the residue of his lands in H. to C., the devise to C. is not residuary. *Re Brown*, 1 K. & J. 522; *Springett v. Jennings*, 6 Ch. 333; see

Residuary and specific gift.

this subject fully treated under specific legacies, *ante*, p. 84.

Similarly, though the fund is not of definite amount, if it is distributed in definite proportions; as, for instance, one-fourth to A. and the rest to B., B. will not take A.'s share if it lapses. *Simmons v. Rudall*, 1 Sim. N. S. 115.

When the residue will not carry lapsed legacies.

Again, there may be an intention that the residue is not to include lapsed legacies. Thus, though a "small" balance would include any balance that may happen to remain after making the payments directed by the testator: *Page v. Young*, 19 Eq. 501; the bequest of the "small remainder" will not include interests that lapse. *A. G. v. Johnstone*, Amb. 576.

Similarly if the only residue given is the "residue remaining" after payment of certain legacies, it will not include those legacies if they lapse. *Easum v. Appleford*, 10 Sim. 274, 5 M. & C. 59; *Green v. Pertwee*, 5 Ha. 249. In the goods of *O'Loughlin*, 2 P. & D. 102.

Though on the other hand a residue given generally though expressed to be after payment of previous definite sums may very well be read as a gift of the residue generally subject to those payments. *Carter v. Taggart*, 16 Sim. 423; *Harries' Trust*, Joh. 199.

Residue of a residue.

And it is said a residue of a residue will not include a lapsed share of the residue. *Skrymsher v. Northcote*, 1 Sw. 566; *Lloyd v. Lloyd*, 4 B. 231.

CHAPTER XII.

CONVERSION.

I. WHAT AMOUNTS TO A DIRECTION TO CONVERT.

Property directed to be converted is considered as that species of property into which it is to be converted, and passes to a legatee or devisee as if the conversion had actually taken place.

What amounts to a direction to convert.

A direction that land is to be considered as money or *vice versa* will not work a conversion, but an actual change of one form of property into another must be intended. *Johnson v. Arnold*, 1 Ves. sen. 171; *A. G. v. Mangles*, 5 M. & W. 120; *Edwards v. Tuck*, 23 B. 268, 3 D. M. & G. 40.

Direction that land is to be considered money or money land will not convert.

A direction to divide does not imply a conversion. *Cornick v. Pearce*, 7 Ha. 477; *Lucas v. Brandreth*, 28 B. 273.

Direction to divide.

But a direction to get together and divide property consisting of realty and personalty and previously described as scattered about and not realised, is in effect a direction to convert. *Mower v. Orr*, 7 Ha. 475.

A mere power to convert will not effect a conversion. *Greenway v. Greenway*, 2 D. F. & J. 128.

Power to convert.

Though if legacies payable in the ordinary course are to be paid after the conversion, the power is in effect a trust. *Burrell v. Baskerfield*, 11 B. 525.

Where a conversion is directed the fact that the trus-

tees have a discretion as to time will not alter the general rule. *Doughty v. Bull*, 2 P. W. 320.

Conversion
upon re-
quest.

When conversion is to take place upon request the question is whether the conversion was intended to be made in all events, and the request is only an additional safeguard, or whether no conversion was intended till request.

If the conversion is to be upon request of certain persons, and the property is disposed of, if converted, or not, there is no conversion till the request. *Taylor's Settlement*, 9 Ha. 596; *Davies v. Goodhew*, 6 Sim. 585.

On the other hand, if there is a general intention to convert evidenced by the fact that the limitations are applicable only to the property as converted, and by the fact that the conversion is to be at the request of certain persons, or the survivor or the executors or administrators of the survivor, the property will be considered as converted. *Thornton v. Hawley*, 10 Ves. 129; see *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211.

Power to
continue
govern-
ment se-
curities
where
there is a
trust to
convert.

Where there is an express trust to convert a power to continue any government stocks and real securities will be confined to such as are of a permanent character. *Ticknor v. Old*, 18 Eq. 422.

But where the trust was to convert such parts as should not be invested in the public funds or government securities, long annuities were held within the exception, and enjoyable in specie. *Wilday v. Sandys*, 7 Eq. 455.

Absolute
discretion
to trustees.

Where trustees have an absolute discretion to convert or not the property remains unconverted till the discretion is exercised. *Polley v. Seymour*, 2 Y. & C. Ex. 708; *Yates v. Yates*, 6 Jur. N. S. 1023; *Brown v. Bigg*, 7 Ves. 279; *Bourne v. Bourne*, 2 Ha. 35.

Similarly where trustees have an option to convert either into realty or personalty, the property will be considered of that species into which the trustees convert it.

Van v. Barnett, 19 Ves. 102; *Walker v. Denne*, 2 Ves. jun. 170; *Rich v. Whitfield*, L. R. 2 Eq. 583.

The option of the trustees may, however, be controlled by the general intention expressed in the will. Thus, if the property to be converted is settled to uses exclusively applicable to realty; as, for instance, in tail with remainders, the property will be considered as realty notwithstanding the option. *Earlom v. Saunders*, Amb. 241; *Hereford v. Ravenhill*, 5 B. 51.

Discretion
may be
controlled
by the con-
text.

And in such a case an ultimate limitation to the testator's right heirs, executors, and administrators will not prevent the property being considered as land with respect to the prior interests. *Cowley v. Harstonge*, 1 Dow. 361.

The fact that personalty which trustees have an option to convert is given to a person, his heirs and assigns, is not sufficient to limit the option of the trustees. *Atwell v. Atwell*, 13 Eq. 23.

But if it is given to a person and his heirs for ever, the property will apparently be considered converted notwithstanding the option of the trustees. *Cookson v. Reay*, 5 B. 22; see 12 Cl. & F. 121.

II. WHETHER CONVERSION IS DIRECTED FOR ALL THE PURPOSES OF THE WILL.

1. Where realty is directed to be converted and form part of the personal estate, it will be subject to all the limitations of the personal estate, and will pass by the residuary bequest. *Kidney v. Coussmaker*, 1 Ves. jun. 436; *Robinson v. Governors of London Hospital*, 10 Ha. 19, 27; see *Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 B. 568; *quære*, whether *Collier v. Wakeman*, 2 Ves. jun. 683, would be followed.

Direction
that con-
verted
realty
should form
part of the
personal
estate.

But notwithstanding a direction that monies to arise from a sale of realty are to be considered as part of the personal estate, they will not pass under a gift of the

residuary personalty if the residuary gift is followed by a gift of the monies arising from the sale. *Amphlett v. Parke*, 4 Russ. 75, 2 R. & M. 221.

Gift of the residue of the proceeds of sale of realty under the old law.

2. It seems clear that under the old law a gift of the residue of the proceeds of sale of realty fell under the same rule as an ordinary residuary devise, and did not carry legacies given out of the proceeds, which failed through lapse or otherwise. *Jones v. Mitchell*, 4 S. & St. 290; *Hutcheson v. Hammond*, 3 B. C. C. 128.

Whether converted realty passes by a residuary bequest.

3. Upon the question whether conversion is directed for all the purposes of the will, so that interests in the proceeds of sale of realty which are undisposed of, or fail by reason of lapse or otherwise, are intended to pass by a general bequest of residuary personalty, the cases run into fine, though, perhaps, not irreconcilable distinctions.

Direction to convert at a certain time and divide among persons who may not then be in existence.

a. When conversion is directed at the death of a tenant for life, and the proceeds are to be divided among a class of persons who at that time may not be in existence, or may never come into existence; for instance, such of the children of the tenant for life as attain 21, conversion is not merely for the purpose of division, but for all the purposes of the will, and the property falls into the residuary realty or personalty, as the case may be, if the particular disposition fails. *Walls v. Colshead*, 2 De G. & J. 683.

Gift of a mixed fund to be converted.

b. Where realty and personalty are once for all blended together, and directed to be converted, interests undisposed of will pass to the residuary legatee. *Durour v. Motteux*, 1 Ves. sen. 320, 1 S. & St. 292 *n.*; *Byam v. Munton*, 1 R. & M. 503; *Green v. Jackson*, 5 Russ. 35; 2 R. & M. 238; *Salt v. Chattaway*, 3 B. 576; *Spencer v. Wilson*, 16 Eq. 501; *Court v. Buckland*, 45 L. J. Ch. 214. *Cruse v. Barley*, 3 P. Wms. 20, may probably be accounted for on the principle that the gift of residue there was not of a real residue, but of the residue of a real residue. The residue had in effect already been given

among the testator's children, and the subsequent words only indicated what shares in that residue each was to take and upon lapse of one of those shares a portion of the residue was thereby undisposed of.

c. But when the realty directed to be converted and the personalty are the subject of separate gifts, and are treated as distinct funds, the residuary gift will not carry interests undisposed of in the realty. *Maugham v. Mason*, 1 V. & B. 410; *Hutcheson v. Hammond*, 8 B. C. C. 128.

When realty directed to be converted is the subject of a separate gift it will not pass by residuary bequest.

d. Intermediate between the last two classes of cases falls a class of cases where the real and personal estate are blended together, but the two funds are treated as distinct and independent, in which case the interests in the realty undisposed of will not pass to the residuary legatee.

When realty and personalty are blended but are afterwards treated as distinct funds.

Thus, though realty and personalty are blended together and directed to be converted, if the proceeds of the sale of the realty are treated as a separate fund for certain payments, interests undisposed of will not pass under the gift of the residuary personalty. *Dixon v. Dawson*, 2 S. & St. 327.

So, too, if there is a gift as well of the residue of the monies to arise from the sale as of the residue of the personal estate, the latter residue will not carry legacies given out of the proceeds of sale which lapse. *Gravenor v. Hallum*, Ambl. 643; *Gibbs v. Rumsey*, 2 V. & B. 294.

But the fact that the residue of the money to arise from the sale of realty is expressly given will not prevent such money from passing under the residuary personalty, if the residue of the money is only mentioned as part of the enumeration of the things of which the residuary personalty consists. *Kennell v. Abbott*, 4 Ves. 802.

e. A direction to sell land for the payment of debts will not entitle the residuary legatee to the surplus proceeds after such payment. *Watson v. Arundel*, 1. R. 10 Eq. 299; see, too, p. 64, ante.

III. CONVERSION IS LIMITED TO THE PURPOSES OF THE WILL.

Who is entitled to property directed to be converted but undisposed of by the will.

Conversion directed by a testator is a conversion only for the purposes of the will, and all that is not wanted for these purposes goes to the persons who would have been entitled but for the will. Therefore where real and personal estate is directed to be sold, and after payment of debts and legacies the residue is given to persons, some of whom die before the testator, the lapsed shares go proportionally to the heir at law and next of kin. *Ackroyd v. Smithson*, 1 B. C. C. 503.

Declaration that proceeds of sale of realty are to be personal estate.

A declaration that the proceeds of the sale of realty are to be part of the personal estate for all purposes will not deprive the heir of such proportion of the proceeds of realty as is undisposed of, there being no express gift to the next of kin. *Shallcross v. Wright*, 12 B. 505; *Taylor v. Taylor*, 3 D. M. & G. 190.

Nor will a declaration that the proceeds of the sale shall not lapse for the benefit of the heir, where a disposition is attempted to be made of the property. *Fitch v. Weber*, 6 Ha. 145.

But if the surplus of the sale of real estate is directed to be personal estate, and given to the executors, they take in trust for the next of kin. *Countess of Bristol v. Hungerford*, 2 Vern. 645, corrected 3 P. Wms. 194.

The same rule applies to the case of money to be invested in land, which upon failure of the particular dispositions, or any of them, results so far for the next of kin. *Cogan v. Stevens*, 5 L. J. Ch. 17, 1 B. 482 n.; *Hereford v. Ravenhill*, 1 B. 481, 5 B. 51; *Head v. Godlee*, Johns. 536; *Bective v. Hodgson*, 10 H. L. 656.

IV. HOW THE HEIR AND NEXT OF KIN TAKE PROPERTY DIRECTED TO BE CONVERTED.

1. Where a conversion of realty is directed and the objects of the conversion wholly fail, the heir takes the property as realty, whether a sale has taken place or not. *Chitty v. Parker*, 2 Ves. jun. 271; but *quære* whether the question arose in this case. *Davenport v. Coltman*, 12 Sim. 610.

Where the purpose of the conversion wholly fails.

2. But where some purpose of the will can be answered by a sale, where, for instance, there is a tenant for life or one of several tenants in common, who survives the testator the heir takes the property as personalty. *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 484; *Wilson v. Coles*, 28 B. 215; *Hamilton v. Foot*, I. R. 6 Eq. 572.

Where it fails partially.

It would seem that where realty, directed to be converted, is only an auxiliary fund for payment of debts, and the personalty is sufficient to satisfy them, such realty will, on failure of all the other purposes, go to the heir as land. *Chitty v. Parker*, 2 Ves. jun. 271. (?)

But where realty and personalty are given together to be converted and charged with debts, so that the realty is applicable *pro rata*, the heir takes the realty as money on failure of all the other purposes of the conversion. *A.-G. v. Lomas*, L. R. 9 Ex. 29.

It has been said that the testator's death is the time at which it must be ascertained whether the purposes for which conversion is directed have failed or not, and therefore if at that time those purposes may possibly take effect, the heir takes as money, though they may subsequently fail. *Carr v. Collins*, 7 Jur. 165. The exact point, however, was not there decided, since, in that case, conversion was effectual with respect to the legacy of 1000*l*.

At what time it is to be ascertained whether the purposes have failed.

Money to be laid out in land goes to the next of kin as land.

3. It seems, however, that personalty directed to be laid out in land, but only partially disposed of, will go to the next of kin as money, and not as land. *Reynolds v. Godlee*, Johns. 536, 582.

V. CONVERSION AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Conversion of a residue given to several persons successively.

When there is no express trust to convert, but a residue is given *en masse* to several persons successively, wasting property must be converted, unless it appears from the will that specific enjoyment by the tenant for life was intended. *Howe v. Lord Dartmouth*, 7 Ves. 137; *Johnson v. Johnson*, 2 Coll. 441; *Thornton v. Ellis*, 15 B. 193.

And in the same way the tenant for life is entitled to have reversionary property converted, though the reversion is dependent upon his own life interest. *Wilkinson v. Duncan*, 23 B. 469; *Johnson v. Routh*, 3 Jur. N. S. 1041, 27 L. J. Ch. 305; *Countess of Harrington v. Atherton*, 3 D. J. & S. 352.

What will entitle the tenant for life to specific enjoyment.

As to what is sufficient evidence of intention that the property left by the testator was to be specifically enjoyed:

Interests of the successive takers not antagonistic.

Cases where the residue is given to the testator's widow for the maintenance of herself and her children, and after her death to the children, are of course less strong in favour of conversion than when the interests of tenant for life and remainderman are conflicting. *Wearing v. Wearing*, 23 B. 99; *Marshall v. Bremner*, 2 Sm. & G. 237.

Settlement of an absolute interest.

So, too, where there is an absolute gift to a daughter, which is afterwards cut down by way of settlement to a life interest, there is a strong argument against conversion. *Vachell v. Roberts*, 32 B. 140.

A discretionary power to convert, when trustees may think fit, does not entitle the tenant for life to the enjoyment of the property in specie in the meantime. *Wilkinson v. Duncan*, 23 B. 469; *Llewellyn's Trust*, 29 B. 171; *Yates v. Yates*, 28 B. 637; *Caldecott v. Caldecott*, 1 Y. & C. C. 312; *Meyer v. Simmenson*, 5 De G. & S. 723; *Brown v. Gellatly*, L. R. 2 Ch. 751.

Discretionary power to convert when trustees may think fit.

Nor does a direction to convert from time to time for payment of debts imply that there is to be a conversion for no other purpose. *Caldecott v. Caldecott*, 1 Y. & C. C. 312, 737.

But an absolute discretion to sell "such parts and so much as should be necessary" to pay debts, affords an argument that the tenant for life is to enjoy specifically such parts as the trustees do not sell. *Sewell's Estate*, 11 Eq. 80.

And if a discretion to convert is given, "notwithstanding" the gift to the tenant for life, the tenant for life will be entitled in specie till conversion. *Burton v. Mount*, 2 De G. & Sm. 383.

And the tenant for life is entitled in the meantime, if there is a direction to pay the produce of any portion not converted to him. *Johnston v. Moore*, 27 L. J. Ch. 453; *Mackie v. Mackie*, 5 Ha. 70; *Wrey v. Smith*, 14 Sim. 202; *Lean v. Lean*, 28 W. R. 484; *Miller v. Miller*, 13 Eq. 263.

An express power to sell realty affords no argument for the specific enjoyment of wasting securities. *Jebb v. Tugwell*, 20 B. 84.

But the tenant for life will be entitled to enjoy the property in specie as it existed at the death of the testator, where the gift is not merely of a residue, but there is an enumeration of certain specific things. *Lord v. Godfrey*, 4 Mad. 455; *Vaughan v. Buck*, 1 Ph. 75; *Vincent v. Newcombe*, Young, 599; *Blann v. Bell*, 2 D. M. & G. 775; *Hood v. Clapham*, 19 B. 90; *Bowden v. Bowden*, 17 Sim.

Where the gift is not of a residue simply but of specific enumerated things.

65 ; *Boys v. Boys*, 28 B. 436 ; *Pickering v. Pickering*, 4 M. & Cr. 289 ; *Thursby v. Thursby*, 19 Eq. 395. *Mills v. Mills*, 7 Sim. 501, is not easily reconcilable with the other authorities.

And in such a case the fact that a discretionary power to convert is given makes no difference. *Simpson v. Lister*, 4 Jur. N. S. 1269 ; *Bethune v. Kennedy*, 1 M. & Cr. 114 ; *Hubbard v. Young*, 10 B. 203 ; *Thursby v. Thursby*, *supra*.

The argument, however, in favour of specific enjoyment of things expressly enumerated is less strong where the gift is through the medium of a trust. *Craig v. Wheeler*, 29 L. J. Ch. 374, 8 W. R. 172.

On the other hand, notwithstanding a partial enumeration of specific things, the gift may in effect be merely residuary. *Sutherland v. Cooke*, 1 Coll. 489, where the gift was of "all my money in the Long Annuities, and in all or any other of the public stocks or funds, ready money and securities for money, outstanding debts, and all the rest, residue, and remainder, of my estate and effects, whatsoever and wheresoever, and of what nature or kind soever, the same shall or may consist at the time of my decease, not hereinbefore specifically disposed of," to trustees, who were directed by sale thereof, or of so much as should be necessary to pay debts, &c.

When the gift is of residue simply there may be an intention to give specific enjoyment.

Again, though the gift may be of a pure residue, the testator may show that he contemplates specific enjoyment.

In a will before the Wills Act, if the tenant for life is to take the rents, issues, and profits, he will be entitled to the specific enjoyment of leaseholds, if there are no freeholds to which the term rents may apply. *Goodenough v. Tremamondo*, 2 B. 513 ; *Cafe v. Bent*, 5 Ha. 24.

Use of the words rents and profits.

But in wills since the Wills Act the word rents, by itself, will not have this effect where it is used with other words, none of which have the same specific force. *Pickup*

v. Atkinson, 4 Ha. 624 ; see, too, *Booth v. Coulton*, 7 Jur. N. S. 207.

If the property is specifically given over at the death of the tenant for life, he is entitled to enjoyment in specie. *House v. Way*, 12 Jur. 958, 18 L. J. Ch. 22 ; *Harris v. Poyner*, 1 Dr. 174 ; *Collins v. Collins*, 2 M. & K. 703 ; *Daglie v. Fryer*, 12 Sim. 1.

Gift over of the property in specie at death of the tenant for life.

A gift of a specific part of the residue at the death of the tenant for life will entitle the tenant for life to the specific enjoyment of that part. *Holgate v. Jennings*, 24 B. 623.

But not if the gift at the death of the tenant for life is a mere general gift, though it may be of something which forms part of the residue at the testator's death. *Lichfield v. Baker*, 2 B. 481, 13 B. 447.

An express trust to convert at the death of the tenant for life entitles the tenant for life to specific enjoyment. *Alcock v. Sloper*, 2 M. & K. 699 ; *Harvey v. Harvey*, 5 B. 134 ; *Rowe v. Rowe*, 29 B. 276.

Express trust to convert at the death of the tenant for life.

And where the conversion of a portion is expressly postponed for a certain time, the tenant for life is entitled to specific enjoyment in the meantime. *Green v. Britten*, 1 D. J. & S. 649.

Similarly the tenant for life is entitled where there is a power to sell with his consent : *Hinves v. Hinves*, 3 Ha. 611 ; *Hind v. Selby*, 22 B. 373 ; *Skirving v. Williams*, 24 B. 275 ; or to renew leaseholds. *Crowe v. Crisford*, 17 B. 507.

Power to sell with consent of the tenant for life or to renew leaseholds.

Where the tenant for life is entitled to the enjoyment in specie of the property of the testator as existing at his death, the debts must nevertheless be got in. *Holgate v. Jennings*, 24 B. 623.

Debts must be got in.

In connection with this subject it may be noticed that trustees are bound to convert property upon which there may be not only a loss but a liability, within a year from the testator's death, even though the direction is to con-

Trustees must convert property on which there is a liability.

vert "immediately after my decease, or so soon thereafter as they may see fit to do so." *Sculthorpe v. Tipper*, 13 Eq. 232; *Grayburn v. Clarkson*, L. R. 3 Ch. 605; though a wider discretion will be allowed in the case of property upon which there can be no liability, though there may be a loss. *Hughes v. Empson*, 22 B. 181; *Buxton v. Buxton*, 1 M. & Cr. 80.

Power to carry on the business of the testator.

Executors are, of course, in no case entitled to carry on a testator's business without express authority. *Travis v. Milne*, 9 Ha. 142; *Kirkman v. Booth*, 11 B. 273.

But if they have authority, the testator's estate, so far as the authority goes, is liable to creditors, and legatees have a right of proof in the event of bankruptcy only in respect of so much as has been improperly employed in trade. *Ex parte Richardson*, Buck, 202, 3 Mad. 138; *Ex parte Garland*, 10 Ves. 110; *Scott v. Izon*, 34 B. 434; *Owen v. Delamere*, 15 Eq. 134; *Hall v. Fennell*, I. R. 9 Eq. 406, 615.

VI. CONVERSION BY EVENTS EXTRANEEOUS TO THE WILL.

Effect upon the will of a contract for sale.

Where there is a devise of lands, whether by words of specific or general description, and the testator afterwards sells the lands, the purchase-money falls into the personal residue. And an option to purchase, given by the testator after the date of his will, and exercised after his death, has the same effect. *Weeding v. Weeding*, 1 J. & H. 424.

And where the option to purchase is given before the date of the will, the effect is the same. *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Goold v. Teague*, 7 W. R. 84, 5 Jur. N. S. 116; *Collingwood v. Row*, 26 L. J. Ch. 649.

Drant v. Vause, 1 Y. & C. C. 580; *Emuss v. Smith*, 2

De G. & Sm. 722, are not easily reconcilable with the other authorities. See, too, *Cooper v. Martin*, L. R. 3 Ch. 47.

It makes no difference that the purchase-money is payable to the testator, his heirs, or assigns. *Townley v. Bedwell*, *sup.*; *Weeding v. Weeding*, *sup.*

Similarly the purchase by a mortgagee of the equity of redemption revokes a devise of the mortgaged estate. *Strode v. Lady Falkland*, 2 Vern. 621, 3 Rep. in Ch. 60; *Yardley v. Holland*, 20 Eq. 428.

On the same principle, if there is a contract to purchase realty, which is binding on the testator at his death, the purchase-money is converted into realty, and the heir or devisee is entitled to it, though the vendor may retain a power of rescission which is actually exercised after the testator's death. *Whittaker v. Whittaker*, 4 Bro. C. C. 30; *Garnett v. Acton*, 28 B. 333; *Hudson v. Cook*, 13 Eq. 417.

Contract for sale binding at the testator's death, though subsequently rescinded effects a conversion.

If, however, the contract is not binding on the testator there is no conversion. *Broome v. Monck*, 10 Ves. 597.

So, if the testator has contracted with a builder for the building of a house on a piece of land devised by him, the devisee is entitled to have the contract performed out of the personal estate, whether the Court would decree specific performance of the contract or not. *Cooper v. Jarman*, 3 Eq. 98; see *Re Tann*, 7 Eq. 434.

Contract to build a house.

So where certain property is after the date of the will converted into personalty by Act of Parliament, the property passes as personalty, though the conveyances required by the Act may not have been executed. *Cadman v. Cadman*, 13 Eq. 470; see *Frewin v. Frewin*, 10 Ch. 610.

Conversion under statutory powers.

Similarly a notice to treat under the compulsory powers of a Railway Company, followed by an agreement as to the price to be paid, converts the lands in question. *Ex*

parte Hawkins, 13 Sim. 569 ; *Re Manchester and South-port Railway*, 19 B. 365 ; *Watts v. Watts*, 17 Eq. 217.

A mere notice to treat is not sufficient to effect a conversion : *Haynes v. Haynes*, 1 Dr. & Sm. 426 ; nor is a notice to treat followed by a statement on the part of the vendor of the sum he is willing to take, if he dies before it has been accepted. *Re Battersea Park Acts, Ex parte Arnold*, 32 B. 591.

And an agreement, if land is taken under compulsory powers to pay so much an acre for it, will not cause conversion. *Ex parte Walker*, 1 Dr. 508.

But in cases where conversion takes place the devisee is, under section 23 of the Wills Act, entitled to the rents between the testator's death and the completion of the purchase. *Watts v. Watts*, 17 Eq. 217.

On the same principles, where realty has been rightfully converted, whether by a trustee in bankruptcy or under a decree of the Court, it passes as personalty. *Banks v. Scott*, 5 Mad. 493 ; *Steed v. Preece*, 18 Eq. 192 ; and in the latter case the conversion is held to take place as from the date of the decree. *Arnold v. Dixon*, 19 Eq. 113.

Where more than was necessary has been sold under a decree, the surplus, it has been held, retains its former character. *Cooke v. Dealey*, 22 B. 196 ; *Jerny v. Preston*, 13 Sim. 356 ; but see *Steed v. Preece, supra*.

Conversion
into fee
simple of
renewable
leaseholds
held in
quasi tail.

As to the effect of the conversion of renewable leaseholds for lives and years held in *quasi* tail into a fee under statutory powers, see *Morris v. Morris*, I. R. 6 C. L. 73, ib. 7, p. 295 ; *In re Dane's Estate*, I. R. 10 Eq. 207 ; *Batteste v. Maunsell*, I. R. 10 Eq. 314.

CHAPTER XIII.

GIFTS TO PERSONÆ DESIGNATÆ AND TO PERSONS FILLING A CERTAIN CHARACTER.

I. For the purpose of ascertaining the persons to take under certain names and descriptions, evidence is admissible : firstly, of all the facts known to the testator at the time of making his will ; secondly, of any peculiar names or phrases which the testator was in the habit of using, whether nicknames or names erroneously applied to certain objects, provided in the latter case there are no persons to whom the names correctly apply, and for this purpose any documents or writings of the testator, including a prior will, are admissible : *Reynolds v. Whitan*, 16 L. J. Ch. 434 ; see *Feltham's Trusts*, 1 K. & J. 532 ; *Gregory's Will*, 34 B. 600 ; and evidence of the objects the testator was likely to benefit : evidence, for instance, to which of two societies, both insufficiently answering a certain description, the testator was in the habit of subscribing. *Kilvert's Trusts*, 12 Eq. 183 ; 7 Ch. 170.

What evidence is admissible.

If among the objects thus shown to be known to the testator there is some one who fully answers the description in the will, evidence to show that another person was meant is not admissible : *Delmare v. Robello*, 1 Ves. jun. 412 ; 3 B. C. C. 446 ; *Holmes v. Custance*, 12 Ves. 279 ; *In the goods of Peel*, L. R. 2 P. & D. 46.

Person fully answering the description will take as *persona designata*.

And a legatee is sufficiently described by his first

Christian name : *Mostyn v. Mostyn*, 5 H. L. 155 ; or even by initials. *Abbot v. Massie*, 3 Ves. 148.

But not if he was unknown to the testator.

It is, on the other hand, perfectly clear that the mere fact of a person fully answering to the description in the will (the description being of a *persona designata*) will not entitle him to take under it if it appears from the admissible evidence that the testator was not aware of his existence. Therefore, under a gift to Elizabeth, daughter of Mary Beynon, or to my nephew Joseph, neither Elizabeth, an illegitimate daughter, nor a nephew called Joseph, will take if it appears that the testator was not aware of their existence. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 481 ; *Grant v. Grant*, L. R. 5 C. P. 380, 727.

Evidence of nickname, &c., is admissible.

The testator may have habitually called certain persons or things by peculiar names by which they are not commonly known, and of this evidence is admissible ; thus, where the gift was to Catherine Earnley, evidence was admitted to show whom the testator was in the habit of calling by that name. *Beaumont v. Fell*, 2 P. Wms. 141 ; *Masters v. Masters*, 1 P. Wms. 421 ; *Dowset v. Sweet*, Ambl. 175 ; *Lee v. Pain*, 4 Ha. 251 ; *Kell v. Charmer*, 23 B. 195.

But not evidence to explain a patent ambiguity.

But if the testator merely designates legatees by letters having no reference to their names, there is a patent ambiguity which may not be explained by evidence. *Clayton v. Nugent*, 13 M. & W. 200.

Blanks may not be supplied.

Where a blank is left for the name of a legatee, no evidence of intention is admissible, and the gift is void for uncertainty. *Winn v. Littleton*, 2 Ch. Ca. 51 ; *Baylis v. Attorney-General*, 2 Atk. 239 ; *Hunt v. Hort*, 3 Bro. C. C. 311 ; *Taylor v. Richardson*, 2 Dr. 16.

Where, however, there is a clear gift to a certain class, and an intention is expressed of including or excluding certain persons whose names are left in blank, the clause of inclusion or exclusion only is void for uncertainty, and

the gift to the class is good. *Illingworth v. Cooke*, 9 Ha. 37; *Gill v. Bagshaw*, L. R. 2 Eq. 746.

But if the testator goes on to define the class by name, and inserts the names of persons who cannot alone be said to constitute the class, leaving blanks for other names, the gift is void for uncertainty; for instance, if the gift be to my nephews and nieces, John and Nanny, followed by a blank, John and Nanny not satisfying the description nephews and nieces. *Greig v. Martin*, 5 Jur. N. S. 329.

The fact that a blank is left for the Christian name of the legatee will not avoid the legacy if there is no doubt to whom the rest of the name applies. *Price v. Page*, 4 Ves. 680; *Phillips v. Barker*, 1 Sm. & G. 582, where the gift was to — Davis, daughter of S. Davis, and the testator knew only of one daughter at the date of the will. See *Re Gregson's Trusts*, 12 W. R. 935.

II. Where the legatee is inaccurately named, or described so that there is no one who fully answers the name or description, the Court will if possible gather from the contents of the will and the surrounding circumstances who was meant. *Ryall v. Hannam*, 10 B. 536; *Camoy's v. Blundell*, 11 Sim. 467; 1 Ph. 279; 1 H. L. 778; *Stringer v. Gardiner*, 27 B. 35; 4 De G. & J. 468; *Douglas v. Fellows*, Kay, 114.

Inaccurate
descrip-
tion.

The fact that a legatee has once been accurately described will not prevent his taking another gift under a less full or inaccurate description. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 285; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384.

But it will if the two descriptions are so different as to raise a strong probability that the same legatee cannot have been meant. *Lee v. Pain*, 4 Ha. 254.

If a legatee is mentioned by name, and an erroneous description is added, the name will prevail if there is a

Name ac-
curate,
superadded

description
inaccurate.

person fully answering to the name, and no one to answer the description. *Veritas nominis tollit errorem demonstrationis*. *Standen v. Standen*, 2 Ves. jun. 589; 6 B. P. C. 193; *Doe d. Gains v. Rouse*, 5 C. B. 442; *Re Blackman*, 16 B. 377; *Re Ingle's Trusts*, 11 Eq. 578.

Name in-
accurate,
superadded
description
accurate.

Similarly, if there is no one to answer the name, a person satisfying the description will take. *Pitcairne v. Brase*, Finch, 403; *Dowset v. Sweet*, Amb. 175; *Parsons v. Parsons*, 1 Ves. jun. 266; *Garth v. Meyrick*, 1 B. C. C. 30; *Doe d. Cook v. Danvers*, 7 East, 229.

Equivoca-
tion.

III. If there are several persons who equally answer the whole description, there is an equivocation, and evidence of the testator's intention is admissible. *Lord Cheney's Case*, 3 Rep. p. 137, fol. 68a.; *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235; *Doe d. Gord v. Needs*, 2 M. & W. 129; *Doe d. Allen v. Allen*, 12 A. & E. 451; *Jones v. Newman*, 1 W. Bl. 60; *Jefferies v. Michell*, 20 B. 15.

And if part of the description applies equally to two persons, and the rest of it applies to no one, the portion which has no application may be considered away, so as to raise an equivocation, and make evidence of intention admissible. *Price v. Page*, 4 Ves. 680; *Still v. Hoste*, 6 Mad. 192; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384. These cases are referred to this head by Lord Abinger, C. B., in *Doe d. Hiscock v. Hiscock*, 5 M. & W. 363, 370; but *quære* whether *Price v. Page* was not a case of equivocation strictly, and whether the latter two cases were not mere cases of misdescription. At any rate, in them no evidence of intention proper was offered, but only evidence of surrounding circumstances.

Equivoca-
tion may
arise
though
two per-

It is not, however, necessary that the two persons should strictly and accurately answer the description: it is enough if they both do so equally in a popular sense.

Thus a father and son both equally answer the description John Smith, though properly speaking the son is John Smith the younger. *Jones v. Newman*, 1 W. Bl. 60.

sons may not both answer the same description with equal accuracy.

So a person whose name was W. M. and one whose name was W. J. R. B. M. were both held equally to answer the description W. M., since a man is popularly known by his first Christian name. *Bennett v. Marshall*, 2 K. & J. 740.

It makes no difference that the will itself shows that there are two persons equally answering a given description. For instance, if there is a gift to G. G., son of J. G., another to G. G., son of G. G., and a third to G. G., son of G. *Doe d. Gord v. Needs*, 2 M. & W. 129.

The will may on the face of it raise a case of equivocation.

But parol evidence is not admissible to show to which of two antecedents in the will a word of reference is to be referred, if, for instance, two Ann Collins's have been mentioned, and there is a gift to the said Ann Collins. *Fox v. Collins*, 2 Ed. 107; *Castledon v. Turner*, 3 Atk. 257.

No case of equivocation arises if it can be gathered from the will which of several persons equally answering the name is meant, as in a devise to M. W., my brother, and to Simon, my brother's son—the son of the brother just mentioned being clearly indicated. *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57; *Healy v. Healy*, 1. R. 9 Eq. 418.

An apparent case of equivocation may be explained by the will itself.

And, similarly, if a legatee has once been accurately described, and the same name is afterwards mentioned without the description, evidence is not admissible to show that a different legatee of that name was meant. *Webber v. Corbett*, 16 Eq. 515; *Richardson v. Watson*, 4 B. & Ad. 787.

But the case is different if there is first a gift to A. B.

and then a gift to A. B. of X., and there are two A. B.'s, one of X. and one not. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235.

Whether
nephews
proper and
a wife's
nephews
are both
equally
nephews.

Further, it is clear that if there were a gift to "my nephews" as a class, evidence that the testator generally applied the term to his wife's nephews would not raise a case of equivocation so as to make evidence of intention admissible as between nephews proper and wife's nephews. *Beachcroft v. Beachcroft*, 1 Mad. 430, which may be cited to the contrary, so far as it cannot be upheld *ex visceribus* of the will, has been generally disapproved.

It is equally clear that if the testator at the date of his will had only a wife's nephew called Joseph, the subsequent birth of a brother's son called Joseph would not entitle the latter to take under a gift to my nephew Joseph. And the result would be the same if the testator at the date of his will was not aware that his brother had a son called Joseph. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; *Grant v. Grant*, L. R. 5 C. P. 380, ib. 727. My nephew Joseph is clearly *persona designata*, and the question then is whom did the testator mean to point out?

Evidence of intention, though in fact admitted in *Grant v. Grant*, was not necessary for the decision, since the testator cannot have meant to benefit a person of whose existence he was not aware, under a particular name and description, and therefore a case of equivocation cannot be said there to have arisen.

Whether evidence of intention would be admissible if the testator was aware at the date of his will that both his brother and his brother-in-law had sons called Joseph is doubtful, though the judgment in *Grant v. Grant* seems to go to this.

Case where
part of a
description

IV. If there is a gift by name, with a particular description superadded, and there is some one who answers

to the name and some one who answers to the description, no evidence of intention is admissible. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; *Bernasconi v. Atkinson*, 10 Ha. 345; *Charter v. Charter*, L. R. 2 P. & D. 815, ib. 7 H. L. 364.

applies to one person and part to another.

In some cases if there is nothing to point out one person more than the other, the gift will be void for uncertainty. *Thomas v. Thomas*, 6 T. R. 671; *Drake v. Drake*, 8 H. L. 172. See *Cope v. Henshaw*, 85 B. 420.

In such cases the rule that the name is to prevail against an error of demonstration can only apply if it is clear that the error is in the demonstration. And therefore either the name or the description will prevail, according as it is reasonably certain that the mistake is more likely to be made in the name than in the description, or *vice versa*.

If the gift is to A. B., second son of C. D., and A. B. is the third son, and there is nothing either in the will or in the relations of the second and third sons to the testator to point out one more than the other, the name will prevail. *Doe d. Chevalier v. Huthwaite*, 8 Taunt. 306; 2 Moo. 304; see 3 B. & Ald. 632; *Pryce v. Newbolt*, 14 Sim. 354; see, too, *Farrer v. St. Catherine's Coll.*, 16 Eq. 19.

Gift to A., second son of B., where A. is the first son of B.

But it may appear from the will or the relations of the second and third son to the testator, or from the fact that one of the sons was otherwise provided for, whether the name or description was erroneous. Thus, if one of the two was godson or well known to the testator, the other not, the former takes. *Bernasconi v. Atkinson*, 10 Ha. 345; *Gregory's Will*, 34 B. 601; *Hodgson v. Clarke*, 1 D. F. & J. 394.

So if the testator, after a limitation to A. B. the second son of C., limits remainders to the third and fourth sons and so on, the argument is strong that the description

and not the name was to prevail. *Bradshaw v. Bradshaw*, 2 Y. & C. Ex. 72.

But this argument was held not to apply where the limitations were to R. G. fourth son of G. G. in fee, in case he should attain twenty-one, but if he should die under that age to the fifth son in fee, and so on; and accordingly R. H. G., the third son, took. *Gillett v. Gane*, 10 Eq. 29.

Where the description is careful and elaborate it prevails.

If, on the other hand, the description is such as to particularise a certain person, and to leave no doubt as to which of two persons was meant, the description will prevail. *Smith v. Coney*, 6 Ves. 42; *Lee v. Pain*, 4 Ha. 253; *Adams v. Jones*, 9 Ha. 485; *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.*, 7 H. L. 364.

And though there may be a person answering to the name, if there are in the will expressions which show that he could not have been meant, the case falls under the same head, and it becomes a question whether the name or the description is to prevail. *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.*, 7 H. L. 364.

Where the description supplies a motive for the gift.

If the description is such as itself to supply a motive for the gift, it will prevail. *Nunns' Trusts*, 19 Eq. 331; see *Re Fry*, 22 W. R. 679, 813; *Re Blayney's Trust*, 1. R. 9 Eq. 413.

B. GIFTS TO PERSONS FILLING A CERTAIN CHARACTER.

Gift to a legatee in a certain character.

The mere fact that a gift is made to a legatee in a certain character does not avoid the legacy if the legatee does not happen to fill the character. *Schloss v. Stiebel*, 6 Sim. 1; *Giles v. Giles*, 1 Keen 685; *Re Pitt's Will*, 27 B. 576; unless the legatee fraudulently assumed the character for the purpose of deceiving the testator. *Ken-nell v. Abbott*, 4 Ves. 802; *Wilkinson v. Joughin*, L. R. 2 Eq. 319; see *Rishton v. Cobb*, 5 M. & Cr. 145.

A gift to the testator's servants goes to those in his service at the date of the will, whether they remain in it till his death or not. It is doubtful whether a servant subsequently entering his service would be included. *Parker v. Marchant*, 1 Y. & C. Ch. 290. Servants.

A bequest to the two servants who shall be living with me at my death goes to all living with the testator at his death, though there may have been only two at the date of the will. *Sleech v. Torrington*, 2 Ves. sen. 560; but a servant wrongfully discharged by the testator before his death will not be included: *Darlow v. Edwards*, 1 H. & C. 547.

As to what kinds of servants will take :—A bequest of a year's wages limits the servants to those hired by the year. *Booth v. Dean*, 1 M. & K. 560; *Blackwell v. Pennant*, 9 Ha. 551; see, too, *Chilcot v. Bromley*, 12 Ves. 114; *Herbert v. Reid*, 16 Ves. 481; *Thrupp v. Collett*, 26 B. 147; *Armstrong v. Clavering*, 27 B. 226; *Ogle v. Morgan*, 1 D. M. & G. 359.

In wills under the Wills Act a gift to the testator's wife must mean the wife or the person calling herself his wife at the date of the will, as a second marriage operates as a revocation of the will, and therefore a deceased wife's sister may take under the description of the testator's wife. *Pratt v. Matthew*, 22 B. 328; *Pitts' Will*, 27 B. 576; 5 Jur. N. S. 1235. Gift to the testator's wife.

But *primâ facie* wife means lawful wife. *Davenport's Trusts*, 1 Sm. & G. 126.

Primâ facie a gift to the wife of A. who has a wife living at the date of the will goes to that wife and no other. *Boreham v. Bignall*, 8 Ha. 131; *Burrow's Trusts*, 10 L. T. N. S. 184. Gift to the wife of a third person goes to his wife living at the date of the will if any.

At any rate this is the case if there is anything to show that the testator referred to a person known to him by calling her, for instance, my beloved wife. *Niblock v. Garrett*, 1 R. & M. 629.

And when a daughter has been described as wife of A. a subsequent gift to her husband means that husband only. *Bryans' Trust*, 2 Sim. N. S. 103; *Franks v. Brooker*, 27 B. 635.

But a gift, after a life interest to a son, amongst the wife of the son (in case she should survive him) and all and every the children of the son, has been held to include a second wife though there was a wife living at the date of the will, as it would include children by a second marriage. *In re Lyne's Trust*, 8 Eq. 65; but see *Firth v. Fielden*, 22 W. R. 622.

And a direction that in case of the bankruptcy of any of the legatees for life, their shares should be applied for the benefit of the wife and children of such legatees during the remainder of the life of the legatee, will include a second wife of one of the legatees who was married at the date of the will; the direction, being applicable to several legatees, some of whom were not married, showing that no particular wife was intended. *Longworth v. Bellamy*, 40 L. J. Ch. 513.

But a similar direction as to the share of one legatee who was married at the date of the will will not include a second wife: *Boreham v. Bignall*, 8 Ha. 131.

Gift to the wife of a person who is unmarried.

If there is no person answering the description at the date of the will or the death, the gift vests indefeasibly in the first person who answers the description. *Radford v. Willis*, 12 Eq. 105, 7 Ch. 7; see *Peppin v. Beckford*, 3 Ves. 570.

As to the effect of a divorce upon a gift to a husband and wife during their joint lives, see *Knox v. Twells*, 2 H. & M. 674.

Gifts to husband and wife and a third person.

"If an estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety." *Littleton*, sec. 291. The same rules apply to personalty, and it makes

no difference whether the bequest is a joint tenancy or a tenancy in common.

Thus a bequest to A. and B. his wife and C. as tenants in common goes in moieties to A. and his wife and to C. *Wylde's Estate*, 2 De G. M. & G. 724.

But a similar bequest during their lives and the life of the survivor of them, and after the death of the survivor over, would be enough to show that the wife was to take a separate interest. *Marchant v. Cragg*, 31 B. 398.

If the bequest is to A., B. and C. and the wife of C. equally, the second "and" is looked upon as a *subcopula*, and the property goes in thirds. *Bricker v. Whatley*, 1 Vern. 232.

So, too, if the gift is to A., his wife and children, the husband and wife take one share. *Gordon v. Whieldon*, 11 B. 170; *Atcheson v. Atcheson*, ib. 485.

But a very slight evidence of intention that the wife is to take a separate share has been held sufficient to prevent the rule; thus, if the words are to A., B., C. and his wife as tenants in common, husband and wife take several shares. *Warrington v. Warrington*, 2 Ha. 54, where the husband and wife were equally of kin to the testatrix; see, too, *Payne v. Wagner*, 12 Sim. 184.

And apparently if the words are to my son-in-law B. and my daughter P. his wife, their executors, administrators, and assigns, both take equally—the gift not being to husband and wife, but to son-in-law and daughter-in-law. *A. G. v. Bacchus*, 9 Pr. 30, 11 Pr. 547.

Whether a gift to unmarried children is a *designatio personarum* or not depends on the language of the will. Thus, a gift to the son and unmarried daughters of A. goes to the daughter unmarried at the date of the will, the gift to the son showing that particular persons are meant. *Hall v. Robertson*, 4 D. M. & G. 781.

Meaning of the word unmarried in a direct gift.

Where the gift designates a class ascertainable at the

testator's death, the subsequent marriage of one of the class will not avoid the gift. *Jubber v. Jubber*, 9 Sim. 503 ; see *Blagrove v. Coore*, 27 B. 138.

As to whether unmarried in a direct gift means never having been married or not, see *Thistlethwayte's Trusts*, 1 Jur. N. S. 881 ; 24 L. J. Ch. 713.

Gift to "a son."

A gift to "a son" of a person will, it seems, go to the son living at the date of the gift, if there is one. *Powell v. Davies*, 1 B. 532. And if there is no son living it goes to the first son born afterwards, if he survives the testator. *Powell v. Davies*, 1 B. 532 ; *Ashburner v. Wilson*, 17 Sim. 204 : see, too, *Russell v. Russell*, 12 Ir. Ch. 377.

Gift to one of a class is void.

A gift to one of a class, as to one of the sons of a person, is void. *Strode v. Russell*, 2 Vern. 621, 624.

Gifts to a first or second son.

The natural meaning of first or second son is first or second in order of birth.

1. No difficulty arises where all the sons born are living at the testator's death, or where no sons have then been born. In the latter case the first or second son born afterwards will take. See *Driver v. Frank*, 3 Mau. & S. 25 ; 8 Taunt. 468 ; *Alexander v. Alexander*, 16 C. B. 59 ; *Bennet v. Bennet*, 2 Dr. & Sm. 266. And the second born son will take as second son, though his elder brother may die before he is born. *Trafford v. Ashton*, 2 Vern. 660.

2. If there is a first son at the date of the will it seems probable that he would take as *persona designata*. *Saunders v. Richardson*, 18 Jur. 714 ; see *Re Harris*, 2 W. R. 689.

So, too, if there were a first and second son living at the date of the will the second son would probably take under the description second son. Whether the second son at the date of the will whose elder brother had died would take as second son, *quære*.

3. If a first or second son is dead at the date of the

will the term will mean first or second son at the testator's death. *King v. Bennett*, 4 M. & W. 36; *Thompson v. Thompson*, 1 Coll. 388,—where the provisions of the will were confirmed after the death of the first born son by a codicil.

4. If a first or second son is born after the date of the will and dies in the testator's lifetime, a first or second surviving son will take. *Lomax v. Holmdon*, 1 Ves. sen. 290.

Unless the testator contemplates the possibility of lapse and provides for it; for instance, by a gift to the seventh or youngest child of a person who at the date of the will had six children. *West v. Lord Primate of Ireland*, 2 Cox, 258; 3 B. C. C. 148.

The terms elder and younger in wills must *primâ facie* be considered as used in their strict sense as applicable to age, and not in the figurative sense of anterior and posterior in order of limitation of estates. *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. Ex. 78, 2 H. L. 167; *Lyddon v. Ellison*, 19 B. 565; *Livesey v. Livesey*, 2 H. L. 419.

Meaning of
the terms
elder and
younger.

A gift to the eldest child of a person whether immediate or in remainder goes to the eldest child at the death of the testator though he may not have been eldest at the date of the will. *Re Harris' Trust*, 2 W. R. 689.

And eldest son may mean only son. *Tuite v. Birmingham*, L. R. 7 H. L. 634; as youngest child may mean only child: *Emery v. England*, 3 Ves. 232.

And if the testator contemplates a younger son as becoming eldest, or if the eldest were dead at the date of the will, eldest son means eldest surviving son: *Bathurst v. Stanley*, W. N., March 18th, 1876, p. 108.

When a testator has made dispositions in favour of his sons, arranging them in a descending order of birth with a gift over of their respective shares in certain events to

Next sur-
viving son.

“my next surviving son,” the next younger son takes under this description. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

The class of younger children is to be ascertained at the period of vesting.

With regard to the period at which the class of younger children is to be ascertained—

If there is an immediate gift to younger children the class will be ascertained at the testator's death, and a child who after that time becomes eldest will not be excluded. *Coleman v. Seymour*, 1 Ves. sen. 209; *Umbers v. Jaggard*, 9 Eq. 201.

Similarly, if the gift is to younger children who attain twenty-one, a child who is a younger child when it attains twenty-one will take, though it may afterwards become eldest: *Adams v. Roberts*, 25 B. 658. The decision in *Matthews v. Paul*, 3 Sw. 328, may be supported on the ground that the son excluded was the eldest at the time of vesting as well as at the time of distribution.

In the same way an eldest son to be excluded will be ascertained at the time of vesting and not the time of distribution. *Sandeman v. Mackenzie*, 1 J. & H. 613; *Adams v. Bush*, 8 Sc. 405; 6 Bing. N. C. 164; *Theed's Settlement*, 3 K. & J. 375; *Adams v. Adams*, 25 B. 652.

Contrary intention.

The testator may, however, show that the persons filling the character of eldest or youngest children were to be ascertained at the time of distribution by contemplating, for instance, the possibility that several persons successively might become eldest sons after the time of vesting. *Bowles v. Bowles*, 10 Ves. 177; *Livesey v. Livesey*, 2 H. L. 419; *Madden v. Ikin*, 2 Dr. & S. 207.

When the gift is to a class of younger children upon a contingency the cases are conflicting.

Where the gift is to younger children upon some contingency, the cases are conflicting.

If there are no children surviving when the contingency happens the gift goes to the representatives of those who died in the lifetime of an elder brother. *Lady Lincoln v. Pelham*, 10 Ves. 166.

If there are children living when the contingency happens, *Ellison v. Airey*, 1 Ves. sen. 111, and *Hall v. Hewer*, Amb. 203, are direct authorities for saying that the eldest child is to be then ascertained, and not before. See, too, *Stevens v. Pile*, 30 B. 284.

But now it would probably be held that the class ought to be ascertained at the time when the interests become transmissible, and it was so decided in *Bryan v. Collins*, 16 B. 14. See, too, *Sanders' Trust*, L. R. 1 Eq. 675.

The exclusion from a class of a child "entitled" to certain property means *prima facie* entitled in possession: *Chorley v. Loveland*, 33 B. 189, 12 W. R. 187; *Umbers v. Jaggard*, 9 Eq. 201.

Meaning of
"entitled."

See further as to the construction of similar clauses of exclusion, *Wyndham v. Fane*, 11 Ha. 287; *Johnson v. Foulds*, 5 Eq. 268; *Re Gryll's Trust*, 6 Eq. 589.

When, however, the testator has placed himself *in loco parentis*, and shows an intention to provide portions for younger children, the rule established with regard to marriage settlements, that elder son means a son taking the bulk of the estate, and younger son a son unprovided for, applies to wills, as well in the case of personalty as of realty. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

In what
cases eldest
son means
a son tak-
ing the
bulk of the
estates.

In such cases the rule is that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement shall take any benefit from the portions: *Macoubrey v. Jones*, 2 K. & J. 684, 690.

Even in marriage settlements, however, this construction will not be adopted, unless it appears upon the face of the instrument that the exclusion had reference to the fact of the person to be excluded taking other property. *Re Theed's Settlement*, 3 K. & J. 375.

The time for ascertaining who fills the character of eldest son is the period of distribution, but he need not then be entitled to the settled estate if he has substantially had the benefit of it. *Collingwood v. Stanhope*, L. R. 4 H. L. 43.

Younger son may mean son not taking the family estate.

And a younger son who at that time has become the eldest, and takes the estate will be excluded from a portion, though the portion may have already vested in him. *Gray v. Earl of Limerick*, 2 De G. & S. 370; *Richards v. Richards*, Johns. 754; *Davies v. Huguenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47; see *Leake v. Leake*, 10 Ves. 476.

If, however, the eldest son is excluded not as eldest son, but by name, the rule does not apply. *Wood v. Wood*, 4 Eq. 48.

In what cases the eldest son is to be ascertained at the period of vesting.

There may, however, be circumstances showing that the eldest son is to be ascertained at some other time than the period of distribution; for instance, at the time of vesting.

A mere gift over to take effect on a younger son becoming an eldest before attaining 21 will not alter the rule. *Bayley's Settlement*, 9 Eq. 491, 6 Ch. 590.

But if there is a clear intention that the portions are to vest indefeasibly before the time of distribution, the elder son is ascertained at the time of vesting. *Windham v. Graham*, 1 Russ. 331; see *Ex parte Smyth*, 12 Ir. Ch. 487.

Under what title a son must take the family estates in order to be excluded from a portion.

The further question arises in what manner the younger child must be entitled to the estate in order to be excluded from a portion.

A second son, becoming an eldest son, but prevented from taking the estate by a recovery suffered in the lifetime of his brother, is entitled to share in portions provided by the settlement for younger children. *Tennison v. Moore*, 13 Ir. Eq. 424; *Spencer v. Spencer*, 8 Sim. 87;

Macoubrey v. Jones, 2 K. & J. 684; *Adams v. Beck*, 25 B. 648, overruling *Peacocke v. Pares*, 2 Kee. 689.

So, too, a younger son succeeding to the reversion of the settled estates, not under the settlement creating the portions, but by descent or by devise, is not within the rule, and does not lose his right to a portion. *Sing v. Leslie*, 2 H. & M. 68; *Adams v. Beck*, 25 B. 648.

On the other hand, as a younger child becoming elder, is excluded from taking a portion, so an elder child not taking the estate is admitted to a portion. *Duke v. Doidge*, 2 Ves. sen. 203.

An elder son not taking the estate may be entitled to a portion.

And if he dies before the period of distribution his representatives are entitled, whether the exclusion is of the eldest son for the time being, or not: *Ellison v. Thomas*, 2 Dr. & Sm. 111, 1 D. J. & S. 18; *Davies v. Huquenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47.

An elder son has been included under the expression second and other sons, in cases where the probability was that the elder had been left out by mistake: *Langston v. Langston*, 8 Bl. N. S. 16, 2 Cl. & F. 194; *Blake's Estate*, 19 W. R. 765; *Tavernor v. Grindley*, 32 L. T. N. S. 424; but not when there were sufficient reasons for his exclusion. *Birmingham v. Tuite*, 1 R. 7 Eq. 221, L. R. 7 H. L. 634.

Gift to second and other sons has in some cases included a first son.

CHAPTER XIV.

CONSTRUCTION OF GIFTS TO CHILDREN.

A. ILLEGITIMATE CHILDREN.

Children
means legi-
timate
children.

I. "THE description child, son, issue, every word of that species must be taken *prima facie* to mean legitimate child, son, or issue:" per Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 422. And it may be stated as a general rule that where there is a bequest to children without anything on the face of the will to show that the testator meant by children illegitimate children, and there is a possibility at the date of the will of legitimate children to satisfy the terms of the bequest, evidence *dehors* the will will not be admitted to prove that the testator may or must have meant illegitimate children. *Durrant v. Friend*, 5 De G. & S. 343; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Medworth v. Pope*, 27 Beav. 71; *Warner v. Warner*, 15 Jur. 141, 20 L. J. Ch. 273; and see *Gabb v. Prendergast*, 1 K. & J. 439; *Godfrey v. Davis*, 6 Ves. 48; *Kenebel v. Scrafton*, 2 East, 530; *Harris v. Lloyd*, T. & R. 310; *Mortimer v. West*, 3 Russ. 370; *Bagley v. Mollard*, 1 R. & M. 581; *Swaine v. Kennerley*, 1 V. & B. 469; *Meredith v. Farr*, 2 Y. & C. C. 525.

The same rule applies where the words next of kin are used. *Re Standley's Estate*, L. R. 2 Eq. 303.

As to whether an illegitimate child of a Frenchman having domicil in England is legitimised by subsequent marriage, see *Wright's Trusts*, 2 K. & J. 595; and see *In re Wilson's Trusts*, L. R. 1 Eq. 247.

II. But under the description of child, son, issue, and similar words, illegitimate children may take if they have acquired the reputation of being children of the person in question in the following cases :

In what cases illegitimate children may take.

1. If looking at the circumstances existing at the date of the will there is no possibility of legitimate children to satisfy the terms of the bequest.

When there is no possibility of legitimate children.

(a) If, for instance, the bequest is to the children of A. now living, and A. has only illegitimate children, they would take : *Dover v. Alexander*, 2 Hare, 282, per Wigram, V. C.

(b) Or if the gift is to the children of a deceased person who had only illegitimate children. *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Edmunds v. Fessey*, 29 Beav. 233.

(c) If the gift is to the children in the plural of a deceased person who had only one legitimate child and one or more illegitimate children, they will all take in order to satisfy the plural number. *Gill v. Shelley*, 2 R. & M. 336; *Leigh v. Byron*, 1 Sm. & G. 486; but see *Hart v. Durand*, 3 Anstr. 684.

If, however, it does not appear on the face of the will that the person to whose children the bequest is given was dead at the date of the will, and the testator was not a near relation, it will not be presumed that he knew of the death, but evidence will be admitted to show that he was aware of it. See *Herbert's Trusts*, 1 J. & H. 121; *Milne v. Wood*, 42 L. J. Ch. 545.

(d) The description "children" will also be taken to mean illegitimate children when the gift is to the children of two persons who cannot by any possibility have legiti-

mate children between them. *Bayley v. Snelham*, 1 S. & St. 78.

(e) And it seems that a bequest by an unmarried man or woman to his or her children must mean illegitimate children, because every will since the Wills Act made by a man or woman is revoked by his or her marriage; see sec. 18; and, therefore, none but illegitimate children could by any possibility take under it. See *Pratt v. Matthew*, 22 Beav. 328; and *Clifton v. Goodbun*, 6 Eq. 278.

Circumstances insufficient to admit illegitimate children.

But under a gift to the children of a living person, when there is no evidence on the face of the will to show that illegitimate children are intended, illegitimate children alone will take. And this will be the case—

Though the person whose children are to be benefited has, at the date of the will, only illegitimate children. *Godfrey v. Davis*, 6 Ves. 43; and at the testator's death there is no possibility of any others: *Re Davenport's Trusts*, 1 Sm. & G. 126; *Kelly v. Hammond*, 26 B. 36; *Dorin v. Dorin*, L. R. 7 H. L. 568.

It will also be the case, though the person to whose children a gift is bequeathed has only illegitimate children, and is, whether from old age or other causes, never likely to have any other. *Re Overhill's Trust*, 1 Sm. & G. 362; *Paul v. Children*, 12 Eq. 16.

Frazer v. Piggott, *Beachcroft v. Beachcroft* discussed.

There are, however, two cases in which this rule has not been followed. *Frazer v. Piggott*, You. 354, before Lord Lyndhurst; and *Beachcroft v. Beachcroft*, before Sir Thomas Plumer, M. R., 1 Mad. 430. In the former, after a bequest to the testator's grandchildren, being children of his sons, whether born in wedlock or not, there was a gift of residue to his two sons, and if either died his moiety to go to his children equally. Both sons died in the testator's lifetime. One had only illegitimate children, the other legitimate and illegitimate children. Lord Lyndhurst held that the illegitimate children of the

son, who had no others, and the legitimate children alone of the other son were entitled. Lord Lyndhurst lays down, "If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended."

The same would seem to follow from the decision of Sir Thomas Plumer in *Beachcroft v. Beachcroft*, which was the case of a bequest by an unmarried man to "my children." See, too, *Laker v. Horder*, 1 Ch. D. 644.

These cases have, however, been repeatedly questioned. See *James v. Smith*, 14 Sim. 216; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Holt v. Sindrey*, 7 Eq. 170. And so far as they go to establish a rule that a gift by will to the children of a living person, who at the date of the will has only illegitimate children, and never has any others, is good as regards the illegitimate children, they cannot be held to be law. It may, however, be noticed that the decision in *Beachcroft v. Beachcroft* may be upheld on grounds independent of any such rule. The Master of the Rolls seems to adopt the principle that children means present children: "It is unreasonable to suppose that a man sitting down to make his will and intending bounty to the children of a certain individual, should not have in his mind some present person to fill that character;" but afterwards he lays stress upon the words "mother of my children," as indicating that the testator meant illegitimate children, for, he asks, "Did anybody ever describe his wife by the term mother of my children?" p. 444; and finally he says, "I think *ex visceribus* of the will, the legatees whom this testator must have intended to describe were not the possible progeny of after marriage but existing persons, children already born." So that the case would rather seem to be one in which the testator has on the face of his will shown that he meant illegitimate children to take. See *per* Stuart, V.C., *Re Overhill's Trusts*, 1 Sm. & G. 362.

The testator may show that he meant illegitimate children.

2. Illegitimate children existing at the date of the will, including a child then *en ventre*, may take under the term children if they are sufficiently indicated, that is to say, where "taking the will as the dictionary of the meaning of the terms used in it," it appears that the testator meant illegitimate children. *Wilkinson v. Adam*, 1 V. & B. 422, p. 462; *Hill v. Crook*, 24 W. R. 876. "The intention need not be expressed in language which is necessarily susceptible of only one interpretation, but it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator." *Hill v. Crook*, L. R. 6 H. L. 277, *per* Lord Chelmsford.

a. Thus natural children, born at the date of the will, of course take where the gift is to natural children in express terms. *Metham v. Duke of Devonshire*, 1 P. Wms. 529; *Barnett v. Tugwell*, 31 B. 232; *Evans v. Massey*, 8 Price, 22; *Bentley v. Blizard*, 4 Jur. N. S. 652.

b. So if after a gift to the children of A., the testator in a subsequent gift defines whom he means, by adding "namely," and inserting their names. *Meredith v. Farr*, 2 Y. & C. C. 525.

c. If there is a gift to the children of the testator by a particular woman, when it appears on the face of the will that he has a wife living, or to "my wife A. for life, and after her death to my children," where the testator is not married to A., but has a wife living from whom he is separated, his children by A. will take. *Wilkinson v. Adam*, 1 V. & B. 422; *Lepine v. Bean*, 10 Eq. 160. See *Bayley v. Snelham*, 1 S. & St. 78.

d. So, a gift to "my daughter A. the wife of B.," and then for the "children of my said daughter," where A. and B. can by no possibility have legitimate children between them, will go to the illegitimate children of A. by B. *Hill v. Crook*, L. R. 6 H. L. 265.

But the same rule does not apply if A. and B., though unmarried at the date of the will, may marry and have legitimate children. *In re Ayles' Trusts*, 1 Ch. D. 282. In that case, however, it does not appear whether the testator knew that A. and B. were unmarried at the date of the will.

e. Under a gift to the children of the testator's daughter by her present putative husband, or by any other person whom she might marry, though the daughter subsequently married her then putative husband, her illegitimate son by him took. *In re Brown's Trust*, 16 Eq. 239. *In re Connor*, 2 J. & Lat. 456; *Dilley v. Matthews*, 13 W. R. 676, 11 Jur. N. S. 425.

f. When in an early part of the will an illegitimate child has been particularly referred to as my child, such child will take under a subsequent gift to children generally. *Worts v. Cubitt*, 19 Beav. 421; *Evans v. Davies*, 7 Ha. 498; *Owen v. Bryant*, 2 De G. M. & G. 697; *Tugwell v. Scott*, 24 Beav. 141; *Hartley v. Tribber*, 16 Beav. 510. See, however, *Bagley v. Mollard*, 1 R. & M. 581.

And when a testator has called the son of an illegitimate child his grandson, the daughter of the same child will be included under grandchildren. *Allen v. Webster*, 6 Jur. N. S. 574.

g. In *Holt v. Sindrey*, 7 Eq. 170, there was a bequest to the testator's "daughter Mary, the wife of John Lattimer," and after her death "unto all and every the child or children of his said daughter begotten or to be begotten." It appeared that Mary was not the lawful wife of John Lattimer, and that the testator was not aware of this fact. Stuart, V.-C., held that illegitimate children born at the date of the will were sufficiently described by the words "children begotten." See, too, *In re Dixon*, 2 Jur. N. S. 970; *Gabb v. Prendergast*, 1 K. & J. 439; and in *Savage v. Robertson*, 7 Eq. 176, a bequest

to "my sister, Mary Robertson, and her 2 youngest daughters," Mary Robertson being a spinster, was held a sufficient designation of her two youngest illegitimate daughters. See *Laker v. Hordern*, 1 Ch. D. 644.

h. A direction, however, to divide property into shares corresponding in number with the number of legitimate and illegitimate children of a person at the date of the will, is not in itself a sufficient indication that illegitimate children are meant to be included, since, if before the testator's death one or more of the children had died, the division prescribed by the will would have been inapplicable. *Cartwright v. Vaudry*, 5 Ves. 530; *In re Wells' Estate*, 6 Eq. 599.

Whether
legitimate
and illegi-
timate
children
can take
together
under one
descrip-
tion.

III. It has sometimes been laid down that legitimate and illegitimate children cannot together take under the same description or the same class. For instance, in *Bagley v. Mollard*, 1 R. & M. 581, the M. R. said, "Whenever the general description of children will include legitimate children it cannot also be extended to illegitimate children," p. 586. See, too, *per* Lord Romilly, M. R., in *Pratt v. Matthew*, 22 Beav. 328. "It is also clear that illegitimate children cannot take under a gift to children unless it be quite clear on the face of the gift that legitimate children never could have taken under the gift." As early an authority, however, as *Wilkinson v. Adam*, 1 V. & B. 422, seems to point the other way (see especially the opinion of the judges there stated), though the exact point was not decided, but there is no doubt now since the case of *Hill v. Crook*, L. R. 6 H. L. 265, that a gift to children, with a clear intention that it shall apply to existing illegitimate children, will be so applied, although the gift must be extended to future legitimate children.

Bequest to
future ille-
gitimate

IV. A bequest to future illegitimate children, born between the date of the will and the testator's death,

where they are sufficiently designated, is good as regards those children who have at the time of the testator's death acquired the reputation of being the children in question.

children is good as regards those born before the testator's death.

Previously to the case of *Occleston v. Fullalove*, 9 Ch. 147, the general current of authority seems to have been in favour of the opinion that no gift, however express, to unborn illegitimate children would be allowed by law, and that under a gift, good as to illegitimate children as a class, no illegitimate children born after the date of the will would be permitted to take. (See *per* Lord Chelmsford, in *Hill v. Crook*, L. R. 6 H. L. 278.) This opinion was frequently expressed incidentally by the judges (see, for instance, *per* Lord St. Leonards in *In re Connor*, 2 J. & Lat. 460; Lord Romilly, *Medworth v. Pope*, 27 Beav. 73; *Holt v. Sindrey*, 7 Eq. 176, and *per* Lords Chelmsford and Colonsay in *Hill v. Crook*, L. R. 6 H. L. 265); but the exact point does not appear to have been decided till *Howarth v. Mills*, L. R. 2 Eq. 391. In that case there was a bequest by a single woman, "to each and every of my children, legitimate or otherwise, who shall be living at the time of my decease," and Lord Hatherley held that illegitimate children born after the date of the will could not take. See also *Metham v. Duke of Devon*, 1 P. Wms. 529, and the remarks on that case by the L. J. James in *Occleston v. Fullalove*, L. R. 9 Ch. p. 167. The grounds of the opinion and the decision based upon it were that a gift to future illegitimate children is against public policy, as being an inducement to vice; but the decision of the Lords Justices of Appeal in *Occleston v. Fullalove*, 9 Ch. 147, has now settled that there is no rule of policy preventing gifts by will to future illegitimate children where it is sufficiently clear that they were intended to take, and *Howarth v. Mills* is therefore overruled.

It is a question of some interest whether the judg-

ment of the Lords Justices in *Occleston v. Fullalove* would be upheld by the House of Lords, and considering the adverse judgment of Lord Selborne and the dicta of Lords Chelmsford and Colonsay in *Hill v. Crook*, not dissented from by Lord Cairns, to which must be added the decision of Lord Hatherley in *Howarth v. Mills*, there may be some doubt upon this point.

A gift to future illegitimate children is against public policy, it is said, because it encourages immoral connections and discourages marriage. It is, however, difficult to see how a gift by will which, till the death of the testator, is of no effect, whatever it may be morally, can legally be said to be a consideration or inducement to immorality. If a man were to make a settlement by deed upon himself for life, with remainder to such illegitimate children whom he might at the time of his death be reputed to have by a certain woman, as he should by will appoint, and in default of appointment over, with a general power of revocation, apparently no appointment as to after-born illegitimate children would be good, though the deed may not have been communicated to anyone: see *Dover v. Alexander*, 2 Ha. 275. And the distinction between such a deed and a gift to after-born illegitimate children by will is, no doubt, difficult to draw. But the distinction between cases on either side of a boundary line is necessarily subtle and technical. A deed speaks from its execution, a will is effectual only from the testator's death. A deed is a legal and formal document, requiring a formal execution of the power of revocation; a will is informal and can be revoked or modified in a manner equally informal. In the case of a deed, with a power of revocation, there is a *prima facie* presumption that it will not be revoked, as revocation would involve trouble and expense, which would not be incurred, or incurred in less

measure, in the case of a will. Under these circumstances the distinction, though practically evanescent, may very well be upheld as a matter of legal convenience. At any rate, if the distinction between such a deed as before mentioned and a will is refined, the distinction which would make a bequest to an illegitimate child the day before it is conceived bad, and a similar bequest the day after it is conceived good, is on grounds of public policy equally refined. The inducement, if any, to immorality, when once the strictly legal conception of consideration is departed from, lies as much in the capacity of benefiting illegitimate children by will at all, as of benefiting future illegitimate children.

The decision in *Occleston v. Fullalove*, while deciding that future illegitimate children may take under a gift by will, if sufficiently described, leaves some doubts on the question of what description will suffice. The gift there was "to all other children which the testator might have or be reputed to have by M. L., then born or thereafter to be born," and the Lords Justices laid stress upon the word reputed, as obviating any difficulty which might arise if it were necessary to inquire into the fact of paternity—an inquiry which the law will not undertake. A man makes a gift "to my future children by A. B.;" there is a condition annexed to the gift that they shall be really his children, but that is a condition the existence or non-existence of which it is impossible to ascertain. His access or non-access, the access or non-access of any other person or persons, the more or less profligacy or immorality of the female, the signs of race or caste, or blood, might have all to be inquired into and brought into public discussion before it could be ascertained whether or not they were his children. The law forbids such inquiries, and, except in exoneration of parish rates, accepts no evidence of actual paternity but

Whether express reference to repate is necessary.

the marriage union," *per* Lord Justice James, *Occleston v. Fullalove*, p. 163, and "the cases appear to establish that a bequest to the future illegitimate children of a man is void for uncertainty, because the law will not allow evidence to be given that they are the actual children of the man," *per* Lord Justice Mellish, *ib.* 170. These remarks seem to imply that where future illegitimate children of a particular father are referred to they can only take under a form of words descriptive of the reputation and not the fact of paternity. But the distinction appears to be unimportant, and in *In re Goodwin's Trust*, 17 Eq. 345, where there was a bequest by a woman to "all and every her children and child by Richard Perkins," the M. R. held that an after-born child, who at the time of the testator's death had acquired the reputation of being her child by Richard Perkins, was entitled.

Whether words of futurity are necessary to enable bastards born after the date of the will to take.

Illegitimate children born after the testator's death can in no case take.

Gift to illegitimate child *en ventre* at the date of the will.

Whether child *en ventre* can acquire a title by reputation.

This case, it may be noticed, also decides that words of futurity are not necessary to enable after-born illegitimate children to take unless a distinction could be drawn between "her children" and "all and every her children."

V. Illegitimate children born after the death of the testator, unless *en ventre* at that time, can in no case take under his will. Such a gift would, in fact, be the same as a gift by deed upon an immoral condition. *Crook v. Hill*, 24 W. R. 876.

VI. With regard to an illegitimate child *en ventre sa mère* at the date of the will, such a child can take if it is sufficiently designated; thus, a bequest to the child with which a woman is at the time pregnant is a good bequest, as there can be no uncertainty. *Evans v. Massey*, 8 Pr. 22; *Gordon v. Gordon*, 1 Mer. 142.

But if a child is described with reference to its father there seems to be considerable doubt whether the bequest is not void for uncertainty. To establish the fact of

paternity would involve an inquiry which the law will not allow, and it is doubtful whether an illegitimate child can acquire a title by repute till it is born. See *Earle v. Wilson*, 17 Ves. 528.

In *Gordon v. Gordon* (sup. cit.) Lord Eldon says, "A bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth" (see, too, *Metham v. Duke of Devon*, 1 P. Wms. 529; *Blodwell v. Edwards*, Cro. El. 509; see 1 Co. Litt. 3 b, Ed. 19).

On the other hand, both Lord St. Leonards and Lord Romilly seem to have thought that an illegitimate child *en ventre* may have a name by reputation. "A child *en ventre sa mère* is a child in esse, and may have a name by reputation," per Lord St. Leonards in *In re Connor*, 2 J. & Lat. p. 460; and "It is undoubtedly true that a child *en ventre sa mère* may acquire a name by reputation although illegitimate," per Lord Romilly in *Pratt v. Matthew*, 22 B. 339. On practical grounds there seems to be no reason why an illegitimate child *en ventre sa mère* should not acquire a title by reputation, and looking at the tendency of the more recent decisions, ending with *Occleston v. Fullalove*, the probability seems to be that the Courts would adopt the opinion of Lords St. Leonards and Romilly.

Where there is a bequest to future illegitimate children, but without a specific description which could apply to a child *en ventre* at the testator's death:

In this case it seems since *Occleston v. Fullalove* that if the gift is to the future illegitimate children of a woman, a child *en ventre* at the time of the testator's death would be admitted to take. For when the so-called rule of public policy against bequests to illegitimate children born between the date of the will and the testator's death is rejected, there seems to be no reason why illegitimate

Whether child *en ventre* at the death will take under a gift to future illegitimate children.

children *en ventre* should be treated by the law with less favour than legitimate.

Where the gift, however, is to future illegitimate children with a reference to the father, the same difficulty with regard to reputation arises as in the case previously mentioned. If, however, a bastard *en ventre* can acquire a title by repute, it seems it would take under the gift in question if the repute is acquired at the time of the testator's death, which appears to be the proper limit for fixing it. See *per* Lord Justice Mellish, L. R. 9 Ch. 171.

B. LEGITIMATE CHILDREN.

The term children includes children by a first and second marriage.

1. *Children primâ facie* includes children by a first and second marriage: *Barrington v. Tristram*, 6 Ves. 345; and even where there was an express reference to a present or any future husband, children by a former husband were not excluded: *Pasmore v. Huggins*, 21 B. 103; *Re Pickup's Will*, 1 J. & H. 389; but there may be an intention to exclude the children of a first marriage. *Lovejoy v. Carter*, 35 B. 149.

Children do not include grandchildren.

2. A gift to the children of a living person will not go to his grandchildren though he may have only grandchildren living at the date of the will and the testator's death. *Moor v. Raisbeck*, 12 Sim. 123.

If, however, the gift is to the children of a person deceased, who had only grandchildren living at the time, the grandchildren will take: *Berry v. Berry*, 3 Giff. 134; 9 W. R. 889; and they will take to the exclusion of great-grandchildren. *Fenn v. Death*, 23 B. 73.

But a gift to the children of a deceased person, who has only grandchildren living at the date of the will, will not go to the grandchildren if the will distinguishes between children and grandchildren. *Loring v. Thomas*, 2 Dr. & S. 497.

And a gift to the children of several persons deceased will not include the grandchildren of one who had no children at the date of the will if there are any children of the others to take. *Radcliffe v. Buckley*, 10 Ves. 195.

3. A gift to children hereafter to be born or that may be born will not, without more, exclude children already born. *Hibblethwait v. Cartwright*, Ca. tem. Talb. 31; *Wilkinson v. Adam*, 1 V. & B. 422, 464; *Harrison v. Harrison*, 1. R. 10 Eq. 290.

Gift to children to be born will not exclude those born already.

But where there are gifts to three out of four children living at the date of the will, a gift to each child that may be born applies only to after-born children. *Early v. Middleton*, 14 B. 453; 3 D. F. & J. 1.

And in the same way a testator may confine his bounty to posthumous children. *Doe d. Blakiston v. Haslewood*, 10 C. B. 544; see *White v. Barber*, 5 Burr. 2703; *Re Lindsay*, 3 Ir. Ch. 239.

Posthumous children.

4. Words *primâ facie* referring to present children, such as "to children lawfully gotten," or "to every child he hath," will not exclude after-born children if they can fairly be construed as referring to the stirps. *Browne v. Groombridge*, 4 Mad. 495; *Ringrose v. Bramham*, 2 Cox, 384; see *Goodfellow v. Goodfellow*, 18 B. 356.

After-born children, where excluded.

A gift to "children who survive me" will not exclude those born after the testator's death. *Re Clarke's Estate*, 3 D. J. & S. 111.

5. An express gift to one child will not prevent his taking under a subsequent gift to children: *Reay v. Rawlins*, 29 B. 88; see *Hanna v. Bell*, 7 Ir. Ch. 208; nor will a gift to A. and her daughter for their lives exclude the daughter from taking under a gift in remainder to the children of A. and her daughter. *Almack v. Horn*, 1 H. & M. 630.

Express gift to a child will not exclude him from a subsequent gift to children.

On the other hand, a gift to several children by name will not prevent other children from taking under a sub-

sequent gift to children. *Moffat v. Burnie*, 18 B. 211; see *Re Connor*, 8 Ir. Eq. 401.

Whether under a gift to a class for their lives and then to their children the children of parents dead at the date of the will or dying in the testator's lifetime are excluded.

6. When there is a gift to the members of a class for their lives, with remainder to their children, the death of a member of the class in the lifetime of the testator after the date of the will will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take. *Habergham v. Ridehalgh*, 9 Eq. 395.

On the other hand, if the gift is to the testator's brothers and sisters for their lives, with remainder to their children, and the testator has only one brother living at the date of the will, children of deceased brothers and sisters will take. *Barnaby v. Tassell*, 11 Eq. 363.

Whether a gift to the children of A. and B. is a gift to B. or his children.

7. In a gift to the children of A. and B.:—

a. If A. and B. are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A. and my brother B. *Mason v. Baker*, 2 K. & J. 567; see *Whicker v. Mitford*, 3 B. P. C. 442.

b. If they do not bear the same relation to the testator, and A. has children at the date of the will, while B. is unmarried, the gift goes to B. and the children of A. *Stumvoll v. Hales*, 34 B. 124.

c. So, too, if A. is described as deceased; for instance, if the gift be to the children of the late A. and B., B. and the children of A. will take. *Lugar v. Harmon*, 1 Cox, 250; but see *Re Davies' Will*, 29 B. 93.

This is *à fortiori* the case where B. is referred to as a legatee. *Ingle's Trusts*, 11 Eq. 578.

d. A gift for “the benefit of the children of A. and of B.” goes to the children of A. and of B. *Peacock v. Stockford*, 3 D. M. & G. 73.

Gift to a certain

8. If there is a gift to the six children of A. who has

only six living at the date of the will, the legacy goes to them. *Sherer v. Bishop*, 4 B. C. C. 55.

number of
children
when there
are more.

And a seventh child *en ventre* at that time will not be admitted to a share. *Re Emery's Estate*, 24 W. R. 917.

But if the number does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case each child will be entitled to a legacy of that sum. *Garvey v. Hibbert*, 19 Ves. 125; *Stebbing v. Walkey*, 2 B. C. C. 85; 1 Cox, 250; *Lee v. Pain*, 4 Ha. 249; *Harrison v. Harrison*, 1 R. & M. 72; *Morrison v. Martin*, 5 Ha. 507; *Yeats v. Yeats*, 16 B. 170; *Spencer v. Ward*, 9 Eq. 507; *Re Bassett's Estate*, 14 Eq. 54.

In such a case evidence is not admissible to show that the testator meant certain of the children, or the children of a particular marriage who may correspond in number with the number mentioned in the will. *Daniell v. Daniell*, 3 De G. & S. 337; *Matthews v. Foulshaw*, 12 W. R. 1141.

The fact that a blank is left for the insertion of the names of the legatees makes no difference. *M'Kechnie v. Vaughan*, 15 Eq. 289.

On the same principle, a gift to the five daughters of A., who has one daughter and five sons, goes to the daughter. *Lord Selsey v. Lord Lake*, 1 B. 151. See *Berkeley v. Pulling*, 1 Russ. 496.

But a gift of 100*l.* a-piece to the four sons of A., who had three sons and a daughter, includes the daughter, the intention being to give four legacies. *Lane v. Green*, 4 De G. & S. 239.

If there is anything to indicate which of the children the testator meant—for instance, an allusion to their residence—the rule of course does not apply. *Wrightson*

v. Calvert, 1 J. & H. 250. See *Hampshire v. Peirce*, 2 Ves. sen. 216.

It appears never to have been decided whether, when the number of children living at the date of the will is erroneously stated, children born after the date of the will and before the testator's death would be included.

C. RULES FOR ASCERTAINING THE CLASS.

At what period the persons to take under words descriptive of a class are to be ascertained.

Immediate gifts.

Where a sum of money is given to a class :—

1. If the gift is immediate the class of children to take is ascertained at the testator's death if there are any children then living. *Singleton v. Gilbert*, 1 Cox, 68; 1 B. C. C. 542 *n*.

The class will not be enlarged by a gift over on death of any of the class under twenty-one: *Davidson v. Dallas*, 14 Ves. 576; *Berkeley v. Swinburne*, 16 Sim. 275; nor by a gift over in default of children. *Andrews v. Partington*, 3 B. C. C. 401; *Scott v. Harwood*, 5 Mad. 332.

If there are no children living at the testator's death all children subsequently born are let in. *Weld v. Bradbury*, 2 Vern. 705; *Shepherd v. Ingram*, Amb. 448; *Hutcheson v. Jones*, 2 Mad. 124.

Future gifts.

2. If the gift is in remainder, all children born at the death of the testator, and coming into esse before the death of the tenant for life, take a share to the exclusion of those born afterwards. *Middleton v. Messenger*, 5 Ves. 136; *Holland v. Wood*, 11 Eq. 91; *Barnaby v. Tassell*, 11 Eq. 363.

So, too, if the life interest is determinable on bankruptcy or some other event, the class is fixed at the time of determination. *Re Smith*, 2 J. & H. 594; *Aylwin's Trusts*, 16 Eq. 585; unless the shares are not to be paid till the death of the tenant for life. *Brandon v. Aston*, 2 Y. C. C. 24, 30.

If no children are born before the death of the tenant for life all after-born children are admitted. *Chapman v. Blissett*, Cas. tem. Talb. 145; *Wyndham v. Wyndham*, 3 B. C. C. 58.

But the rule does not apply if there is a clear intention that distribution is to be made once for all when the fund falls into possession. *Godfrey v. Davis*, 6 Ves. 43; explained in *Conduitt v. Soane*, 4 Jur. N. S. 502.

3. And on the same principle if the interest bequeathed is reversionary, the class is ascertained when it falls into possession. *Walker v. Shore*, 15 Ver. 122; *Harvey v. Stacey*, 1 Dr. 122.

Gift of reversionary property.

But this does not apply where a residue is given, and some portion of the property which falls into it is reversionary: *Hagger v. Payne*, 23 B. 474; *Coventry v. Coventry*, 2 Dr. & Sm. 470; unless there are provisions indicating an intention to treat the reversionary property separately. *King v. Cullen*, 2 De G. & S. 252.

4. If the gift is "to be paid at twenty-one, or to such as attain twenty-one:"

Gift to be paid at twenty-one.

a. If any member of the class attain twenty-one in the testator's lifetime the class is fixed at the testator's death. *Hagger v. Payne*, 23 B. 474. It seems a child *en ventre* at the testator's death will not be included. *Garratt v. Weeks*, 20 Eq. 647, *sed quære*.

b. If not, all born at the testator's death and coming into existence before the eldest attains twenty-one, are admitted. *Hoste v. Pratt*, 3 Ves. 729; *Balm v. Balm*, 3 Sim. 492; *Oppenheim v. Henry*, 10 H. 441; *Gillman v. Daunt*, 3 K. & J. 48; *Lock v. Lambe*, 4 Eq. 372; *Gimblett v. Perton*, 12 Eq. 427.

Secus, when it is a gift of income & not corpus 37 C.D. 366

As a rule each child attaining twenty-one is entitled to have his share paid to him, but this is not so if the whole income is given for maintenance and there are children

who require maintenance. *Berry v. Briant*, 2 Dr. & Sm. 1.

c. It seems doubtful whether, if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one: *Armitage v. Williams*, 27 B. 346, better reported in 7 W. R. 650; which seems an authority, for the affirmative was probably decided on the authority of *Mainwaring v. Beevor*, *post*; see *Harris v. Lloyd*, T. & R. 510.

Exceptions
to the
general
rule.

There are the following exceptions to the rule:—

a. If the time fixed for payment would carry the class beyond the limits of perpetuity, members coming into existence after the testator's death, and before the time of payment, will not be admitted. *Kevern v. Williams*, 5 Sim. 171; *quære* as to *Elliott v. Elliott*, 12 Sim. 276.

Mainten-
ance out of
vested and
presump-
tive shares.

b. Maintenance out of the shares or presumptive shares of children will not extend the class: *Gimblett v. Purton*, 12 Eq. 427; but if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, maintenance is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Grays*, 6 Eq. 215.

In *Defflis v. Goldschmidt*, 19 Ves. 566; 1 Mer. 417, where expressions were used shewing that the parent could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans v. Harris*, 5 B. 45.

Distribu-
tion when
the young-
est attains
21.

c. If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted: *Hughes v. Hughes*, 3 Bro. C. C. 434; 14 Ves. 256; *Mainwaring v. Beevor*, 8 Ha. 44; and perhaps *Armitage v. Williams*, 27 B. 346; 7 W. R. 650; though the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch v. Gooch*, 14 B. 565; 3 D. M. & G. 366.

d. When the gift is of a particular sum to each member of the class, the class is fixed at the death of the testator, whether possession is postponed to 21 or not: *Ringrose v. Bramham*, 2 Cox, 384; *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Butler v. Lowe*, 10 Sim. 817; and if there are no children then in existence, the gift fails. *Mann v. Thompson*, Kay, 638.

Gift of fixed sum to each member of a class.

5. If the gift is to A. for life, then to children who attain 21, the class will be fixed as regards exclusion at the death of A., or when the eldest attains 21, whichever is last: *Clarke v. Clarke*, 8 Sim. 59; *Beckton v. Barton*, 27 B. 99; 5 Jur. N. S. 349; *Parsons v. Justice*, 34 B. 598; where a direction that no child should be excluded in consequence of any other child having attained a vested interest had no effect in extending the class.

Gift to children who attain twenty-one after life interest.

6. A child *en ventre* at the time when the class closes is admitted to share, even though the word "living" or "born" be added to the description. *Doe v. Clarke*, 2 H. Bl. 399; *Clarke v. Blake*, 2 B. C. C. 319; *Trower v. Butts*, 1 S. & St. 181.

Children *en ventre* when the class closes are admitted.

Quære whether *Garratt v. Weekes*, 20 Eq. 647, is consistent with the other authorities.

Similarly, when there is a gift to the children of a tenant for life, a gift over, if at the end of five years she has not had a child, will not take effect if she then has a child *en ventre*. *Pearce v. Carrington*, 8 Ch. 69.

A child *en ventre* is for this purpose supposed to be born at the time of distribution; if, therefore supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding the marriage of its parents before its birth. *In Re Corlass*, 1 Ch. D. 460.

Case of child conceived before but born after marriage.

But though a child *en ventre* is looked upon as existing for the purpose of receiving a benefit, it is not looked upon as existing for any other purpose, if, for instance,

distribution is to be made when the youngest child for the time being attains 21; the fact that there is a child *en ventre* when the youngest attains 21 will not postpone the division. *Blasson v. Blasson*, 2 D. J. & S. 665.

HOW THE CLASS TO TAKE IN DEFAULT OF APPOINTMENT IS TO BE ASCERTAINED.

At what time the class to take in default of appointment is to be fixed.

When there is a gift to children, as A. may appoint, with no gift in default of appointment, and no appointment is made, similar rules apply as to the period at which the class is to be ascertained.

1. A direct gift to children, as A. may appoint, goes apparently to all the children living at the death of the testator, to the exclusion of those born afterwards, though before the death of A. *Coleman v. Seymour*, 1 Ves. sen. 209.

2. A gift to A. for life, with remainder to his children as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before A.'s death. *Crone v. Odell*, 1 Ba. & Be. 449; 3 Dow. 68; *Norman v. Norman*, Bea. 430; *Lambert v. Thwaites*, L. R. 2 Eq. 151.

Case when the only gift is through the power.

3. If the only gift is through the power, so that the children take by implication only, in default of appointment, the rules are the same.

Thus, where there is a power to A. to dispose of certain property among children, the gift, in default of appointment, goes to those born at the testator's death, to the exclusion of those born subsequently. *Longmore v. Broom*, 7 Ves. 124.

And where the gift is to A. for life, and then to dispose of the capital among his children, all children born before A.'s death take a share. *Grieveson v. Kirsopp*, 2 Kee. 653.

4. If the donee of the power and the tenant for life are different persons, and the donee dies before the tenant for life, the class is ascertained at the death of the latter. *White's Trusts*, Johns. 656.

And, apparently, if there is anything to show that personal enjoyment by the beneficiaries was intended, those dying before the tenant for life would be excluded. *White's Trusts*, *supra*; *Carthew v. Enraght*, 20 W. R. 743; *Re Phene's Trusts*, 5 Eq. 347.

At what time the class would be ascertained if the donee of the power survives the tenant for life is uncertain; though by analogy to the case of a direct gift it seems it would be ascertained at the death of the tenant for life, and not of the donee of the power.

5. When there is a direct vested gift to children as A. shall appoint, the fact that the power is to appoint by deed or will, or by will only, will not affect the class to take in default of appointment. *Casterton v. Sutherland*, 9 Ves. 445; *Falkner v. Lord Wynford*, 15 L. J. Ch. 8; *Lambert v. Thwaites*, L. R. 2 Eq. 151, see *Winn v. Fenwick*, 11 B. 438, there discussed. •

Power to
appoint by
deed or
will.

6. But if the only gift is through the power, only those will take in default of appointment who could have taken under the power; and therefore if the power is to dispose of certain property by will, only those who survive the donee can take in default of appointment: *Walsh v. Wallinger*, 2 R. & M. 78; *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 B. 469; see *Brown v. Pocock*, 6 Sim. 257, where it does not appear from the report whether the wife survived her husband or not, see L. R. 2 Eq. 157.

HOW FAR WORDS OF FUTURITY AFFECT THE RULES FOR ASCERTAINING THE CLASS.

How far words of futurity affect the ordinary rules for fixing the class to take under a gift to children.

Children born or to be born.

Mere words of futurity, as, for instance, a gift to the children that may be born, will not extend the class. *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Townsend v. Early*, 3 D. F. & J. 1.

Where the words are "born or to be born," the rules appear to be—

1. When the gift is after a life estate, such words will not extend the class: *Sprackling v. Rainer*, 1 Dick. 344; *Whitbread v. St. John*, 10 Ves. 152; *Parsons v. Justice*, 34 B. 598; though, of course, the case is different if the gift is to children "now born or who shall be born in the lifetime of the tenants for life." *Scott v. Lord Scarborough*, 1 B. 154.

2. The rule is the same where the gift is to children now born or who may be born hereafter who shall attain 21. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 29 B. 447; 6 Eq. 215.

3. But in the case of a direct gift to children "now born or to be born hereafter," it would seem all children would be included, at any rate this is the case with realty: *Mogg v. Mogg*, 1 Mer. 654; *Eddowes v. Eddowes*, 30 B. 603; and there seems no reason why the same rule should not apply to personalty.

4. If, however, the gift is of a lump sum to each of the children begotten or to be begotten, the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator, would be indefinitely postponed. *Butler v. Lowe*, 10 Sim. 317.

D. DISTRIBUTION PER CAPITA AND PER STIRPES.

A gift to A. and the children of B., goes *primâ facie* to all *per capita*, and not *per stirpes*. *Dowding v. Smith*, 8 B. 541; *Rickabe v. Garwood*, 8 B. 579.

Whether a gift to the children of several parents to be distributed *per stirpes* or *per capita*.

So, too, a gift to the children of A. and B., or even to class A., and class B. and C., goes *per capita* to all. *Dugdale v. Dugdale*, 11 B. 402; *Dowding v. Smith*, 8 B. 541; *Pattison v. Pattison*, 19 B. 638; *Armitage v. Williams*, 27 B. 346; *Rook v. A. G.* 31 B. 313; *Amson v. Harris*, 19 B. 210; *Tyndale v. Wilkinson*, 23 B. 74; *Baker v. Baker*, 6 Ha. 269.

But a gift over of the share of any child dying before attaining a vested interest in possession not to the other members of the class but to the brothers and sisters of the child so dying, will import a stirpital distribution. *Archer v. Legg*, 31 B. 187.

Similarly a gift to several and their issue, or to the children and grandchildren of A., goes to all children and grandchildren coming into being before the period of distribution *per capita*. *Barnaby v. Tassell*, 11 Eq. 363; *Lea v. Thorp*, 6 W. R. 480, 4 Jur. N. S. 447, 27 L. J. Ch. 649.

Gift to parents and their issue.

In the same way a gift after a life interest to surviving children and their issue goes to all the children and issue who survive the period of distribution *per capita*. *Re Fox's Will*, 35 B. 163, 13 W. R. 1013. *Shailer v. Groves*, which, as reported in 6 Hare 162, might be cited in favour of a different construction, is there wrongly reported. See 11 Jur. 485, 16 L. J. Ch. 367.

A direction that parents and children are to be classed together, and share in equal proportions, will not import a stirpital distribution. *Turner v. Hudson*, 10 B. 222.

But the word "respective" has a strong stirpital force. Effect of

the word
respective.

Davis v. Bennett, 4 D. F. & J. 327 ; *Ayscough v. Savage*, 13 W. R. 373.

As to the word "devolve," see *Stonor v. Curwen*, 5 Sim. 264.

And if the issue of a stirps are treated as taking among them only one equal share, the stirpital construction will be adopted. *Brett v. Horton*, 4 B. 239 ; *Hunt v. Dorsett*, 5 D. M. & G. 570.

A gift to several and their issue "*per stirpes*," or a direction that issue are to take only their parents' share, is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson v. Stephen*, 2 Dow. & Cl. 328, 5 Bl. N. S. 203 ; *Johnson v. Cope*, 17 B. 561.

In what
cases the
distribu-
tion will be
stirpital
through-
out.

The word
parent used
in a recur-
ring or
sliding
sense.

Whether a direction that issue are to take only the share their ancestor would have taken will have the effect of making the distribution stirpital throughout seems not quite settled.

Where the direction is that the issue are to take a parent's share, and the word "parent" is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be stirpital throughout. *Ross v. Ross*, 20 B. 645 ; *In re Orton's Trust*, 3 Eq. 375 ; *Palmer v. Cruttwell* 8 Jur. N. S. 479.

So, too, where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. N. S. 730.

But a mere direction that the share of any of the original takers dying is to go to his issue would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall v. York*, 5 Jur. N. S. 1237 ; *Southam v. Blake*, 2 W. R. 446 ; *Weldon v. Hoyland*, 4 D. F. & J. 564. *Robinson v. Sykes*, 23 B. 40, which is *contra*, was on a marriage settlement.

If the gift is to several, and their issue *per stirpes*, the stirpital distribution will be carried through throughout, so that no children or remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 B. 214; *Gibson v. Fisher*, 5 Eq. 51.

Effect of
the words
per stirpes.

When the gift is to several for life, and then to their children, the cases are not easily reconcileable.

Gift to
parents for
life and
then to
their
children.

1. It seems clear that a gift to A. and B., as tenants in common for their lives, and then at their death, or at their deaths, or at the death of A. and B., to their children, goes, upon the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Tanière v. Pearkes*, 2 S. & St. 383; *Willes v. Douglas*, 10 B. 47; *Arrow v. Mellish*, 1 De G. & S. 355; *Turner v. Whittaker*, 23 B. 196; *Saril v. Saril*, 23 B. 87; see too *Doe d. Patrick v. Royle*, 13 Q. B. 100; *Brown v. Jarvis*, 2 D. F. & J. 168.

If the gift is after the deaths of the tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita*, *inter se*. *Barnaby v. Tassell*, 11 Eq. 363.

But if the testator goes on to explain what he means by "their children," by adding "that is to say, the children of A. & B.," they take *per capita*. *Abrey v. Newman*, 16 B. 431.

2. But if the gift be to A. and B. for their lives, and at their death not to their children but to the children of A. and B., there seems less reason for contending that the children are to take *per stirpes*.

However, in *Wells v. Wells*, 20 Eq. 342, the stirpital construction was adopted. See *Milnes v. Aked*, 6 W. R. 430; *Re Nott's Trusts*, 20 W. R. 569.

In such a case a superadded direction that, "if there is but one child, the whole is to go to such only child" would afford an argument that the distribution was meant to be *per capita*. *Pearce v. Edmeades*, 3 Y. & C. Ex. 246,

2 W. R. 672; *Swabey v. Goldie*, 1 Ch. D. 380; see, too, *Peacock v. Stockford*, 7 D. M. & G. 129.

3. If the gift to the children is not till after the death of the survivor of the tenants for life, it would seem the distribution will be *per capita*; at any rate if the gift is to the children of A. and B., and not merely to "their children."

Malcolm v. Martin, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; *Stevenson v. Gullan*, 18 B. 590; *Nockolds v. Locke*, 3 K. & J. 6; *Swabey v. Goldie*, 1 Ch. D. 380; see *Alt v. Gregory*, 8 D. M. & G. 221. Perhaps *Smith v. Streatfield*, 1 Mer. 358, comes under this head.

Substitu-
tional gifts.

If the gift is substitutional, as to several or their children, the children take *per stirpes*. *Congreve v. Palmer*, 16 B. 435; *Timins v. Stackhouse*, 27 B. 434; *Gowling v. Thompson*, 19 L. T. N. S. 242.

A simple gift, however, to several or their issue, though it would import a stirpital distribution among the families, would not prevent all the issue of each family from taking *per capita inter se*. *Gowling v. Thompson*, 19 L. T. N. S. 242.

In ascertaining the stirpes, reference is to be made to the original stirpes pointed out by the testator, and not to the stirpes existing at his death, so that there will be as many primary shares as there are original stirpes who at the testator's death have descendants living. *Gibson v. Fisher*, 5 Eq. 51; see, however, *Robinson v. Shepherd*, 10 Jur. N. S. 53; 4 D. J. & S. 129.

re Campbell's trust,
33 Ch. D. 190

CHAPTER XV.

MEANING OF WORDS DESCRIPTIVE OF RELATIONSHIP.

I. NEPHEWS AND NIECES.

NEPHEWS and Nieces mean *primâ facie* the children of brothers and sisters, including those of the half blood. *Falkner v. Butler*, Amb. 514 ; *Grieves v. Rawley*, 10 Ha. 63 ; *Cotton v. Scarancke*, 1 Mad. 45.

Nephews
and nieces
mean
primâ facie
children of
brothers
and sisters.

The meaning of the word will not be enlarged where the gift is to each of the present nieces of A., who had only one niece of the first degree living at the date of the will. *Crook v. Whitley*, 7 D. M. & G. 490.

The fact that a great-niece or a wife's niece has been previously called a niece will not enlarge the meaning of the word. *Shelley v. Bryer*, Jac. 207 ; *Thompson v. Robinson*, 27 B. 486 ; *Smith v. Liddiard*, 3 K. & J. 252 ; *Wells v. Wells*, 18 Eq. 504.

Nor will a gift to my great-nephew, and such *other* of my nephews and nieces as shall be living at my death. *Blower's Trusts*, 11 Eq. 97 ; *ib.* 6 Ch. 351.

But if the testator has at the date of his will and death no nephews and nieces of his own, and there are nephews and nieces of his wife, they will take. *Hogg v. Cook*, 32 B. 641 ; *Sherratt v. Mountfield*, 15 Eq. 305 ; *ib.* 8 Ch. 928 ; see *Adney v. Greatrex*, 17 W. R. 637 ; and " nephews and nieces on both sides " includes a wife's nephew. *Frogley v. Phillips*, 30 B. 168, 3 D. F. & J. 466.

In what
cases a
wife's
nephew
may take.

If a great-nephew is referred to as taking a share of a gift to nephews and nieces, the words will be held to include grand-nephews and grand-nieces. *Weeds v. Bristow*, 2 Eq. 333.

And if the testator expressly defines a niece, as "to my niece, daughter of my nephew," nephews and nieces will include grand-nephews and grand-nieces. *James v. Smith*, 14 Sim. 214.

II. COUSINS.

Cousins. The word cousins means primarily children of uncles and aunts. *Sanderson v. Bayley*, 4 M. & Cr. 56; *Caldecott v. Harrison*, 9 Sim. 457; *Stoddart v. Nelson*, 6 D. M. & G. 68; *Stevenson v. Abingdon*, 31 B. 305.

Second cousins. Second cousins are persons who have the same great-grandfather or great-grandmother, and will not therefore include first cousins once removed. *Corporation of Bridgnorth v. Collins*, 15 Sim. 541.

But if there are no second cousins the term will include all within the same degree of relationship, unless there is an intention to exclude first cousins twice removed, for instance, by a substitutionary gift to the children of second cousins who had died. *Slade v. Fooks*, 9 Sim. 386.

First and second cousins. A gift to "first and second cousins" includes all persons of the degree of second cousins, so that first cousins once and twice removed will be admitted. *Mayott v. Mayott*, 2 B. C. C. 125; *Charge v. Goodyer*, 3 Russ. 140; *Silcox v. Bell*, 1 S. & St. 301.

III. GRANDCHILDREN.

Grand-children. Similarly, grandchildren without more will not include great-grandchildren: *Oxford v. Churchill*, 3 V. & B. 59; but it will if the gift is to grandchildren herein

named, and a great-grandchild has previously been called grandchild. *Hussey v. Berkeley*, 2 Ed. 194.

IV. ISSUE.

A bequest to issue as purchasers goes to all issue, children, grandchildren, &c., as joint tenants, and all come in who are in existence at the time of vesting in possession. *Davenport v. Hanbury*, 3 Ves. 257; *Maddock v. Legg*, 25 B. 531; *Weldon v. Hoyland*, 4 D. F. & J. 564; *Hobgen v. Neale*, 11 Eq. 48.

And in the case of a devise of realty, all such issue take as joint tenants for life, or in fee, according as the will dates before or since the Wills Act. *Cook v. Cook*, 2 Vern. 545; *Mogg v. Mogg*, 1 Mer. 654, 689; *Dalzell v. Welch*, 2 Sim. 319.

1. In the case of realty, however, this construction will be excluded if there is a general intention manifest to keep the estates together in a single line of enjoyment, in which case the estates will devolve according to the rule in *Mandeville's Case*. *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160; and see *Whitelock v. Heddon*, 1 B. & P. 243.

2. And the generality of the word issue will be restrained if the testator explains that he meant by issue children.

In what cases issue means children.

This will be the case if the word issue is coupled with parent: for instance, if the issue are directed to take a parent's share. *Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Sim. 132; *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Martin v. Holgate*, L. R. 1 H. L. 175; *Bryden v. Willett*, 7 Eq. 472; *Heasman v. Pearse*, 7 Ch. 275.

If, however, the word parent is not used in the sense of the first taker, but in what might be called a sliding sense, so as to denote child, grandchild, great-grandchild,

and so on, it will not have the effect of cutting down issue to children. See *Ross v. Ross*, 20 B. 645, where the testator distinguished between a parent's share and a child's share, children being the first takers.

Effect of a gift over in default of issue.

The fact that there is a gift over in default of issue of the first takers affords an argument against construing issue as equivalent to children, though it is not in itself conclusive. See cases *supra cit.*, and *Ross v. Ross*, *supra*; *Re Kavanagh's Will*, 13 Ir. Ch. 120; *Corrie's Will*, 32 B. 426.

Issue of issue.

Issue of issue must mean children of children. *Pope v. Pope*, 14 B. 593; *Williams v. Teale*, 6 Ha. 239; *Heasman v. Pearse*, 7 Ch. 275.

So, too, children of issue will mean children of children. *Fairfield v. Bushell*, 32 B. 158.

As to the meaning of legal issue by marriage, see *Reed v. Braithwaite*, 11 Eq. 514.

Issue lawfully begotten.

The words issue lawfully begotten of a person will not confine issue to children. *Hayden v. Willshire*, 3 T. R. 372; *Evans v. Jones*, 2 Coll. 516.

For cases in which issue has been read children upon the general context of the will, see *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Baker v. Bayldon* 31 B. 209.

At what time the class of issue is to be ascertained in a substitutional gift.

When the gift to issue is substitutional, the class of issue is ascertained once for all at the death of the parent, and will not open to let in persons subsequently born before the period of distribution. *Hobgen v. Neale*, 11 Eq. 48.

In the case of cross-remainders.

And if the gift is to several for life, and then to their issue, with cross remainders between them, the class of issue to take under the cross remainders is fixed once for all at the death of the parent, who is tenant for life, and not at the death of the tenant for life dying without issue. *In re Ridge's Trusts*, 7 Ch. 665.

But in the case of a gift in remainder to issue the

ordinary rules apply, that is to say, all the issue born at the testator's death and coming into being before the death of the tenant for life are admitted. *Surridge v. Clarkson*, 14 W. R. 979.

V. DESCENDANTS.

Descendants means *prima facie* all descendants living at the time of distribution, and apparently they take *per capita*. *Crossley v. Clare*, Amb. 397; 3 Sw. 320; *Butler v. Stratton*, 3 B. C. C. 367. Descendants.

But the expression "descendants or representatives" imports a distribution *per stirpes*. *Rowland v. Gorsuch*, 2 Cox, 187.

It would seem that the term descendants, when used as a word of purchase, and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, descendants would not take in competition with their ancestor. *Tucker v. Billing*, 2 Jur. N. S. 483; and perhaps *Jones v. Price*, 6 Sim. 255, may be supported on this principle. See, too, *Smith v. Pepper*, 27 B. 86; *Best v. Stonehewer*, 34 B. 66; 2 D. J. & S. 537.

VI. RELATIONS.

The words nearest relations explain themselves, and no reference to the statute is necessary to determine the persons to take. *Smith v. Campbell*, 19 Ves. 400; *Brandon v. Brandon*, 3 Sw. 312. See *Goodinge v. Goodinge*, 1 Ves. sen. 231; *Edge v. Salisbury*, Amb. 70. Nearest relations means next of kin.

But the terms relations or near relations or friends and relations are of indefinite meaning, and the Courts, when compelled to determine the persons to take, have Relations.

restricted them to relations capable of taking within the Statute of Distributions, both as regards realty and personalty. *Whitehorne v. Harris*, 2 Ves. sen. 527; *Walter v. Maunde*, 19 Ves. 424; *Thwaites v. Over*, 1 Taunt. 263; *Salisbury v. Denton*, 3 K. & J. 529; *Re Caplin's Will*, 2 Dr. & Sm. 527; 34 L. J. Ch. 578.

The persons pointed out by the statute take *per capita* as joint tenants, and not in the proportions fixed by the statute. *Tiffin v. Longman*, 15 B. 275; *Eagles v. Le Breton*, 15 Eq. 148.

But they take in the proportion directed by the statute where the gift is to relations, share and share alike, as the law directs. *Fielden v. Ashworth*, 20 Eq. 410.

Power to
select.

And though a power to select relations extends to relations generally (*Harding v. Glyn*, 1 Atk. 469, 5 Ves. 501), a mere power to distribute does not (*Pope v. Whitcombe*, 3 Mer. 689), and in default of appointment the Court will restrict the relations to those who can take under the statute. *Grant v. Lyman*, 4 Russ. 292; *Re Caplin's Will*, 2 Dr. & Sm. 527.

Of course the testator may, by explanatory words, extend the word relations to persons not within the statute. *Devisme v. Mellish*, 5 Ves. 529; *Hibbert v. Hibbert*, 15 Eq. 372. See *Bennett v. Honywood*, Amb. 708.

When the
class to
take under
a gift to
relations is
to be ascer-
tained.

Primâ facie the class of relations to take is to be ascertained at the death of the propositus.

Therefore, where the gift is immediate or in remainder to the testator's relations, after gifts to persons who are some of the next of kin, his next of kin at his death alone take. *Rayner v. Mowbray*, 3 B. C. C. 234; *Masters v. Hooper*, 4 B. C. C. 207; *Pearce v. Vincent*, 1 Cr. & M. 598; 2 M. & K. 800; 2 Sc. 347; 2 Bing. N. C. 328; 2 Kee. 230; see *Eagles v. Le Breton*, 15 Eq. 148, where there is a discrepancy between the head note and the judgment. See *Stert v. Platel*, 5 Bing. N. C. 434.

If the gift is to such relations as survive the tenant for life, the class is ascertained at the death of the ancestor, while those who die before the tenant for life are excluded. *Bishop v. Cappel*, 1 De G. & S. 411.

Gift to such relations as survive the tenant for life.

The term relations, however, has not the same direct reference to the death of the propositus as heirs or next of kin, and therefore where there is a gift to A. either for life with remainder to her children, or to A. absolutely, followed by a gift over, if A. dies without issue to the testator's relations, and A. is the sole next of kin at the date of the will and death, the class will be ascertained at A.'s death. *Marsh v. Marsh*, 1 B. C. C. 293; *Jones v. Colbeck*, 8 Ves. 38; *Lees v. Massey*, 8 D. F. & J. 113; see *post*, p. 172, *seq.*

Where the tenant for life is sole next of kin at the date of the will and death.

And the testator may himself fix the time at which his relations are to be ascertained; for instance, by directing his relations to be advertised for at the death of a tenant for life, and giving the property to such of them as claim within two months after such advertisements. *Tiffin v. Longman*, 15 B. 275.

Where there is a power to appoint to relations and no gift in default of appointment.

When the class to take in default of appointment is to be ascertained.

1. If there is no life interest, and the power is a general power to appoint to the testator's relations, it seems the class to take will be ascertained at the death of the testator and not when the power expires: *Cole v. Wade*, 16 Ves. 27; in which case, however, the actual point did not arise, since the next of kin at the testator's death, and the time when the power expired, were the same.

2. If there is a life interest and the tenant for life has power to appoint to the testator's or his own relations, the class is to be ascertained at the death of the tenant for life, whether the power is to appoint by deed or will.

Harding v. Glyn, 1 Atk. 468 ; *Birch v. Wade*, 3 V. & B. 198 ; see, too, in *Brown v. Higgs*, 8 Ves. 561.

And it makes no difference whether the power is one of selection or distribution merely : *Pope v. Whitcombe*, 3 Mer. 689 ; as corrected by Lord St. Leonards on Powers, 662, and *Finch v. Hollingsworth*, 21 Beav. 112 ; *Caplin's Will*, 2 Dr. & Sm. 527 ; see, too, *A.-G. v. Doyley*, 4 Vin. Ab. 485, where the tenant for life and the donee of the power were different persons and the class was ascertained at the death of the tenant for life.

VII. FAMILY.

Family.

The word family may have a different meaning, according to the context.

When it
means
heirs
general.

1. In the widest sense it means heirs general or blood relations generally.

“If land be devised to a stock or family or house it shall be understood of the heir principal of the house” : *Counden v. Clarke*, Hob. 33. This will be the case where the word is used as a quasi-word of limitation, where, for instance, after a devise to a person there is a direction that the property is to remain in his family : *Chapman's Case*, Dyer, 333 ; *Wright v. Atkyns*, 17 Ves. 255 ; *Griffiths v. Evan*, 5 B. 241. And if personalty and realty are given together, “family, when explained by heir, is as indicative of next of kin in personalty as of heir at law in realty.” *White v. Briggs*, 2 Ph. 583 ; *Doe d. Chattaway v. Smith*, 5 Mau. & S. 126.

This is, however, only a convenient rule adopted by the Court, as in the case of relations, and therefore under a power of appointment authorising a selection and not a mere distribution among members of a family, the appointor may select relations not within the degree of

next of kin ; but in default of appointment the Court will adopt the statute as a convenient rule of construction, and will give the property to the next of kin. *Harding v. Glyn*, 1 Atk. 469 ; 5 Ves. 501 ; *Grant v. Lynam*, 4 Russ. 292 ; *Cruwys v. Colman*, 9 Ves. 319 ; *Pope v. Whitcombe*, 8 Mer. 689 ; *Snow v. Teed*, 9 Eq. 622 ; and see *James v. Lord Wynford*, 2 Sm. & G. 350.

2. Sometimes on the context family has been held to mean those of a man's household, thus including a wife or husband : *Macleroth v. Bacon*, 5 Ves. 158 ; *Blackwall v. Bull*, 1 Kee. 176 ; and it might, perhaps, include an illegitimate son. *Lambe v. Eames*, 10 Eq. 267 ; 6 Ch. 597.

In the widest sense it may include a husband or wife.

8. In many cases, however, it is necessary to confine the word to relations in the descending line ; if, for instance, the bequest is to be divided among related families. In this case the words of division, importing a separation between the families, make it impossible to give the word the wider sense of heirs general or blood relations, and it must therefore be confined to relations in the descending line. It may then mean heirs of the body, children, or descendants generally.

When it means relations in the descending line.

a. It will mean heirs of the body in a devise, if there is an apparent intention to keep an estate together in a particular line. *White v. Briggs*, 15 Sim. 17 ; 2 Ph. 583 ; *Woolmore v. Burrows*, 1 Sim. 512 ; *Lucas v. Goldsmith*, 29 B. 657.

b. But the Courts will apparently lean to the meaning of children even in devises of realty, where there is nothing to show that heirs of the body were intended. *Barnes v. Patch*, 8 Ves. 604 ; *Burt v. Hillyar*, 14 Eq. 160. See *Pigg v. Clarke*, 24 W. R. 1014.

Family generally means children.

And generally, with regard to personalty, family *primâ facie* means children : *Terry's Will*, 19 B. 580 ; *Wood v. Wood*, 3 Ha. 65 ; *Parkinson's Trust*, 1 Sim. N. S. 242 ;

Beales v. Crisford, 13 Sim. 592 ; see *Woods v. Woods*, 1 M. & Cr. 401 ; though, if there are no children, it may mean next of kin. *Re Maxton*, 4 Jur. N. S. 407.

c. Family may include all descendants in existence at the period of distribution. This is, however, an improbable construction, and will probably not be willingly adopted. *Williams v. Williams*, 1 Sim. N. S. 358.

4. Where it is clear, that the testator has used the word family in a wider sense than any of those here mentioned, but it is uncertain, who were meant to be included, the gift will be void for uncertainty. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381 ; see *Robinson v. Waddelow*, 8 Sim. 134.

Whether a gift to several families goes *per capita* or *per stirpes* among them.

When family is construed children, a simple gift to the families of A. and B. goes *per capita* in joint tenancy. *Gregory v. Smith*, 9 Ha. 708.

So, too, a gift to be divided between the families of A. and B. goes to all the children of A. and B. *per capita* as tenants in common. *Barnes v. Patch*, 8 Ves. 604 ; see, however, *Alexander v. Douglas*, Rom. Notes of Cases, 93.

CHAPTER XVI.

GIFTS TO HEIRS, NEXT OF KIN, REPRESENTATIVES, AND EXECUTORS.

WHERE Borough English or gavelkind lands are devised with other lands to the testator's heir, the common law heir is entitled. *Davis v. Kirk*, 2 K. & J. 391; *Thorp v. Owen*, 2 Sm. & G. 90; *Buchanan v. Harrison*, 1 J. & H. 662; *Sladen v. Sladen*, 2 J. & H. 869.

Devise of
Borough
English
and Gavel-
kinds to
the heir.

So where Borough English lands alone are devised to a person for life, with remainder to her sons and daughters and their heirs, and if A. dies without having such heirs, to the testator's sons and daughters then living, and the heirs of those who may be deceased, the common law heir takes under the ultimate gift. *Polley v. Polley*, 31 B. 868.

But probably a simple devise of gavelkind lands to the testator's heirs would go to the gavelkind heirs; see *Sladen v. Sladen*, 2 J. & H. 369, 373.

The rule is that "*nemo est hæres viventis*," and therefore a devise to the heirs of a living person is contingent, unless the term heirs is so qualified by express words or by the general intention of the will, as to shew that the testator meant by heir the heir apparent or presumptive or some other person, who will then take as *persona designata*. For instance, by speaking of the heirs of the body of B. now living: *Burchett v. Durdant*, 2 Vent. 311; Carth. 154;

In what
cases the
word heir
refers to a
persona de-
signata.

or the intention of the testator to use the term as designating a person may be gathered from the whole will ; if, for instance, the so-called heir is directed to pay annuities to certain persons during whose life he cannot be strictly heir. *Darbison d. Long v. Beaumont*, 1 P. Wms. 229, 3 B. P. C. 60 ; *Goodright v. White*, 2 W. Bl. 1010 ; *Winter v. Perratt*, 9 Cl. & F. 606.

And a devise to the heirs and assigns of " A., as if she had continued sole and unmarried," is a gift to the person filling the character as *persona designata*. *Brookman v. Smith*, L. R. 6 Ex. 291 ; *ib.* 7 Ex. 271 ; *Dormer v. Phillips*, 4 D. M. & G. 855, 3 Dr. 39, Fearne, C. R. 209—212.

Acknowledgment
of a person
as heir.

The appointment or acknowledgment of a person as heir, though he may not be the real heir, is sufficient to carry to him the testator's real estate. *Parker v. Nickson*, 1 D. J. & S. 177 ; 11 W. R. 533 ; 32 L. J. Ch. 397.

Devise to
the heir of
a particular
name or
to heirs
male.

A devise to the right heirs male, or to the right heirs of a particular name, will go only to the very heir, who must be a male or of that name. *Ashenhurst's Case*, Hob. 34, cit. *Counden v. Clarke*, Moore, 860, pl. 1181, Hob. 29 ; *Wrightson v. Macaulay*, 14 M. & W. 214 ; *Thorpe v. Thorpe*, 32 L. J. Ex. 79.

Heirs of
the body.

The rule does not, however, apply to heirs of the body whether taking by descent or purchase. *Wells v. Palmer*, 5 Burr. 2617, 2 W. B. 687 ; *Evans d. Weston v. Burtenshaw*, Co. Lit. 164a n. (2).

Whether
the heir
male taking
by purchase
must
trace his
descent
through
males.

An heir male taking by inheritance must trace his descent entirely through males. Co. Lit. 25a.

It is said by Jarman, ii. p. 61, that this does not apply to a gift to the heir male or female by purchase, citing Hob. 31, Co. Lit. 25b. At any rate it is clear that if the word lineal be added the heir must trace his descent through males. *Oddie v. Woodford*, 3 M. & Cr. 584 ; *Bernal v. Bernal*, 3 M. & Cr. 559 ; and see *Doe d.*

Angell v. Angell, 3 Q. B. 328; *Thellusson v. Rendlesham*, 7 H. L. 429.

It appears, however, to be concluded by authority that, even in the absence of the word lineal, the heir male taking by purchase must claim through males. *Lywood v. Kimber*, 29 B. 38. See *per* Lord St. Leonards, 7 H. L. 512; and see *Doe d. Winter v. Perratt*, 3 M. & Sc. 594.

RULE IN MANDEVILLE'S CASE, CO. LIT. 26B.,
FEARNE, 80.

“Where an estate is limited to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor (either expressly or by implication) it is impossible to effectuate the expressed will of the donor and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail, which had originally vested in and descended from the ancestor himself, and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor.” *Vernon v. Wright*, 2 Drew. 439, 7 H. L. 35. The result is the creation of a *quasi* entail, partaking of the opposite qualities of purchase and descent. Thus, where the limitation was to Roberge, and the heirs of the body of John de Mandeville by her, where John de Mandeville had left a son and daughter, it was held that the daughter took on the death of the son, *per formam doni*, as the person, who would have been entitled, if the estate had descended from the ancestor.

Rule in
Mande-
ville's case.

The rule in Mandeville's case applies equally where the limitation is to the heirs of the body of the testator: *Allgood v. Blake*, L. R. 7 Ex. 339, *ib.*, 8 Ex. 160; and it has been adopted where the term issue was used: *Whitelock v. Heddon*, 1 B. & P. 243; but it will not be ex-

tended to a devise to the heirs of the body of a deceased person, excluding certain lines of descent, which would comprehend the real heirs of the body: *Allgood v. Blake*, *sup.*; nor does it apply to a devise to the right heirs male of a person: *Ashenhurst's Case*, Hob. 34; though a devise to A. and his heirs male gives A. an estate tail. *Baker v. Wall*, 1 Ld. Raym. 185; *Doe d. Lindsey v. Colyear*, 11 East, 548.

In what cases heirs of the body means children.

Heirs of the body, however, used as a term of purchase, may mean children if the devise is to them as their parent shall appoint, or if they are to take equally among them as tenants in common: *Jordan v. Adams*, 9 C. B. N. S. 483; *Right v. Creber*, 5 B. & Cr. 866; in which case the estate of the ancestor being equitable did not coalesce with the limitation to the heirs.

ASSIGNS.

Assigns.

As a rule the words "and assigns," following the word heirs have no operation, "they have no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have had without them." Wms. R. P. 141; *Brookman v. Smith*, L. R. 6 Ex. 291.

It has, however, been held, that a legal limitation to the heirs and assigns of a person, who had a prior equitable life estate, gave that person a general power of appointment over the property: *Quested v. Michell*, 24 L. J. Ch. 722. See, too, *Tapner v. Marlott*, Willes, 177, and *A.-G. v. Vigor*, 8 Ves. 256, 291; but it is unlikely that this construction will be extended.

The effect, however, of a gift to A. or his heirs or assigns, is to give the absolute interest to A. *Wilton's Estate*, 8 D. M. & G. 173; *Hopkins' Trust*, 2 H. & M. 411. See *post*, p. 177.

BEQUESTS OF PERSONALTY TO HEIRS.

A bequest of personalty to the right heirs, or to the heirs at law, or the next heir of an individual *primâ facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Mounsey v. Blamire*, 4 Russ. 384; *Hamilton v. Mills*, 29 B. 193; *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Re Rootes*, 1 Dr. & Sm. 228; *Southgate v. Clinch*, 27 L. J. Ch. 651, 4 Jur. N. S. 428.

Bequests of personalty to heirs.

The rule applies, *a fortiori*, to a mixed fund. *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Boydell v. Golightly*, 14 Sim. 327.

But the word heirs may be controlled by the context: see *Gamboa's Trust*, 4 K. & J. 757; where a bequest to "the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control," went to the next of kin, under the Statute of Limitations; and *Newton's Trust*, 4 Eq. 171, where the bequest to "the heirs and assigns of my deceased sister" was shown to be *quasi* substitutional by other limitations to the testator's living brothers and sisters and their heirs and assigns; and see *Re Stevens' Trust*, 15 Eq. 110, as to which case *quære*.

In what cases heirs means next of kin.

And, where the word heir is used to denote succession or substitution, it may well be understood to mean such person or persons as would legally succeed to the property according to its nature and quality. *Mounsey v. Blamire*, 4 Russ. 384.

1. Thus, a gift to A. and after his death to his heirs, or to A. for life and then to his heirs, goes to the persons entitled under the Statute of Distributions. *Gittings v. M'Dermott*, 2 M. & K. 69; *Low v. Smith*, 25 L. J. Ch. 503, 2 Jur. N. S. 344; *Evans v. Salt*, 6 B. 266.

Bequest to heirs after a life interest in the ancestor.

Where, however, the intention is to give A. the absolute interest, the word heirs has been held equivalent to executors and administrators: *Powell v. Boggis*, 35 B. 535, where the gift was to A. for life, then to her heirs as she shall give it by will, and if she dies without a will to her right heirs.

And, where the testator directs a division amongst the several heirs of tenants for life, who are related to each other, so that heirs cannot mean next of kin, heirs will mean children. *Bull v. Comberbach*, 25 B. 540; see *Roberts v. Edwards*, 33 B. 259.

Substitu-
tional gift
to heirs.

2. A gift to A. or his heirs goes to the persons entitled under the statute. *Vaux v. Henderson*, 1 J. & W. 388; *Gittings v. M'Dermott*, 2 M. & K. 69; *Jacobs v. Jacobs*, 16 B. 557; *Doody v. Higgins*, 9 Ha. App. 32, 2 K. & J. 729; *In re Craven*, 23 B. 333; *Powell v. Boggis*, 35 B. 535; *Parsons v. Parsons*, 8 Eq. 260.

Heirs of
the body.

And a bequest to A., or the heirs of his body, goes to such of the persons entitled under the statute as may be his descendants. *Pattenden v. Hobson*, 17 Jur. 406, 22 L. J. Ch. 697.

Where
heirs means
next of kin
by statute
the statute
fixes the
proportions
as well as
the per-
sons.

A widow is included in the persons entitled under the statute, and the statute fixes not only the persons but the proportions in which they take. *Re Stevens' Trust*, 15 Eq. 110; *Jacobs v. Jacobs*, *supra*; *Doody v. Higgins*, *supra*.

NEXT OF KIN.

Gifts to
next of
kin.

The words next of kin, without more, mean the nearest blood relations of the propositus in an ascending and descending line, and they take as joint tenants. *Withy v. Mangles*, 10 Cl. & F. 215; *Lucas v. Brandreth*, 28 B. 274; *Arison v. Simpson*, Johns. 43; *Halton v. Foster*, L. R. 3 Ch. 505.

Those of the half blood are equally entitled with those

of the whole blood. *Collingwood v. Pace*, 1 Vent. 424; *Brown v. Wood*, Alleyn, 36; see Williams on Executors, 1120.

But a selective power to appoint to next of kin will authorize an appointment to statutory next of kin. *Snow v. Teed*, 9 Eq. 622.

Under a gift to next of kin *ex parte maternâ*, next of kin *ex parte paternâ*, who happen to be also next of kin *ex parte maternâ*, will not be excluded, except by express words. *Gundry v. Pinniger*, 14 B. 94; 1 D. M. & G. 502; *Say v. Creed*, 5 Ha. 580.

Next of kin
ex parte
maternâ.

But, if there is an express reference to the statute or intestacy, all kindred entitled under the statute, including those who take by representation under the statute, will come in. *Bullock v. Downes*, 9 H. L. 1; *Nichols v. Haviland*, 1 K. & J. 504.

The effect
of a re-
ference to
the statute
or intes-
tacy.

Neither the wife nor the husband take as *next of kin* under the statute. *Garrick v. Lord Camden*, 14 Ves. 372; *Kilner v. Leech*, 10 B. 362.

And a gift to persons, entitled as next of kin or otherwise under the statute, will not include the husband. *Milne v. Gilbert*, 2 D. M. & G. 715; 5 D. M. & G. 510.

But, if only an intention is declared of leaving property to next of kin according to the statute, which is not carried out, the property goes as in an intestacy, and a widow would therefore be admitted. *Ash v. Ash*, 33 B. 187.

A person is not excluded from taking property under a gift to next of kin by the fact that a life interest in the property is expressly given to him. *Gorbell v. Davison*, 18 B. 556.

What will
exclude
one of the
next of kin
from a gift
to next of
kin.

But if the gift is to the "other the next of kin," one of the next of kin to whom an interest is expressly given by the will will be excluded. *Cooper v. Denison*, 13 Sim. 290.

If there is a reference to the statute, the statute regulates the nature of the interest, as well as the persons, who

Whether
the statute
regulates

the nature
of the in-
terest as
well as the
persons to
take.

are to take under it. *Bullock v. Downes*, 9 H. L. 1; *Ranking's Settlement Trusts*, 6 Eq. 601.

The above proposition seems to be justified by the opinions expressed in *Bullock v. Downes*, and would probably be now adopted. However, the cases go to this:—

1. Where there is a reference to intestacy, as well as to the statute, the statute fixes the proportions as well as the persons. *Bullock v. Downes*, *sup.*; *Martin v. Glover*, 1 Coll. 270; *Jenkins v. Gower*, 2 Coll. 537.

2. So, where the gift is to persons “entitled under,” or “under and according to” the statute. *Horn v. Coleman*, 1 Sm. & G. 169; *Ranking's Settlement*, *supra*.

3. If the gift is merely to persons according to the statute, the better opinion seems to be, that the same result would follow: *Mattison v. Tanfield*, 3 B. 131; *Lewis v. Morris*, 19 B. 34. On the other hand the contrary was held in *In re Greenwood's Trusts*, 3 Giff. 390.

4. Words importing or directing a tenancy in common will not prevent the statute from fixing the proportions: *Mattison v. Tanfield*, *sup.*; *Lewis v. Morris*, *sup.* *Richardson v. Richardson*, 14 Sim. 526, must be considered overruled; see *Bullock v. Downes*.

5. It would seem, that a gift *equally* among the persons entitled under the statute, would prevent the statute from fixing the proportions: see *Phillips v. Garth*, 3 B. C. C. 69; but if there are words importing that the distribution is to be according to the statute, the word *equally* will be rejected. *Holloway v. Radcliffe*, 23 B. 163; see *Fielden v. Ashworth*, 20 Eq. 410.

Nearest of
kin by way
of heirship.

A devise of land to the nearest of kin by way of heirship goes to the heir: *Williams v. Ashton*, 1 J. & H. 115; and, similarly, a gift to “next of kin or heir at law” would probably go according to the nature of the property. *Lowndes v. Stone*, 4 Ves. 649.

Next of

In *Boys v. Bradley*, 10 Ha. 389; 4 D. M. & G. 58; 5

H. L. 873, "next of kin in the male line in preference to the female line," was held to mean next of kin *ex parte paternâ*. kin in the male line.

Where the bequest is to persons of a particular name, the question arises whether, in order to take, a person must be of the name or only of the family in question. Thus, "nearest relation of the name of the Pyots" has been held to refer to the stock of the Pyots, so that change of name by marriage was immaterial: *Pyot v. Pyot*, 1 Ves. sen. 335; and the same construction was put upon "next of kin of the surname of Crump." *Carpenter v. Bott*, 15 Sim. 606; *Mortimer v. Hartley*, 6 Ex. 47. Next of kin of a particular name.

Where, however, the gift was to "the next of kin of my name," the daughter of a brother, who was married at the testator's death, did not take: *Jobson's Case*, Cro. El. 576; and, where the name is an essential part of the description, a legatee will not become entitled to the legacy by voluntarily assuming the name. *Leigh v. Leigh*, 15 Ves. 100.

Whether the person, who is to take under the description of a particular name, must satisfy both parts of the description is uncertain: see *Doe v. Plumtre*, 3 B. & Ald. 474, and the remarks of the Vice-Chancellor on that case in *Carpenter v. Bott*, 15 Sim. 606.

A gift to next of kin, to be ascertained at a particular time exclusive of A., who is the sole next of kin, goes to the persons who would have been next of kin, if A. also had been dead. *White v. Springett*, 4 Ch. 300. Gift to next of kin exclusive of A., who is sole next of kin.

The case would, however, be different, if the gift were not to an artificial class of next of kin to be ascertained at a particular time, but to next of kin by statute simply exclusive of A., who happens to be sole next of kin by statute. See *Fearne Posth.* 195.

The testator may show, that he meant by next of kin the children of a tenant for life, as, where the gift was to a daughter for life and then to the testatrix's next Next of kin explained by the context.

of kin, to be vested interests from the testatrix's death, "except as to any child afterwards born of the daughter." *Bird v. Wood*, 2 S. & St. 400; see 2 M. & K. 86, 89.

Gift to
next of kin
of A. as if
she had
died un-
married.

In a gift to the next of kin of A., or even, to the person entitled under the Statutes of Distribution, as if she had died intestate and unmarried, unmarried will be construed as equivalent to "without leaving a husband," since otherwise children would be excluded. *Day v. Barnard*, 1 Dr. & S. 351; *Sanders' Trusts*, 3 K. & J. 152; *Norman's Trusts*, 3 D. M. & G. 965; *Maugham v. Vincent*, 9 L. J. Ch. 329; *Clarke v. Colls*, 9 H. L. 601.

At what
time the
next of kin
are to be
ascertain-
ed.

The terms next of kin and heirs have a direct reference to the death of the ancestor, and therefore next of kin and heirs are to be ascertained at the death of the ancestor; and, where there is in addition a reference to the statute or to intestacy, this rule is almost without exception.

A mixed
fund is no
exception
to the or-
dinary
rule.

The same rules apply to realty, personalty, and to a mixed fund. *Cusack v. Rood*, 24 W. R. 391.

1. Thus the rule applies, whether the bequest to next of kin is immediate or preceded by a life interest or contingent. *Moss v. Dunlop*, Joh. 490; *Bird v. Luckie*, 8 Ha. 301.

2. And, if the gift is to next of kin living at a particular time, it will go to such of the next of kin at the testator's death, as are living at that time. *Spink v. Lewis*, 3 B. C. C. 355.

3. If the gift is to A. for life and then to the testator's next of kin, though A. may be one of the next of kin, or even the only next of kin, at the testator's death, or even the only next of kin at the date of the will as well as at the testator's death, the class will nevertheless be ascertained at the testator's death. *Doe v. Lawson*, 3 East, 278; *Ware v. Rowland*, 2 Ph. 635; *Holloway v. Holloway*, 5 Ves. 399; *Barker's Trust*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 B. 556; *Starr v. Newberry*, 23 B. 436.

The mere exception from the class of next of kin of certain persons, who could only be members of the class on the supposition of the death of the tenant for life, will not alter the time for fixing the class. *Lee v. Lee*, 1 Dr. & Sm. 85; see *Cooper v. Dennison*, 13 Sim. 290.

4. Where, however, the gift is to the next of kin of a deceased person, and the tenant for life is the sole next of kin at the date of the will, so that the class cannot be increased if the tenant for life survives the testator, there is a stronger argument against ascertaining the next of kin at the testator's death; but probably this circumstance would not alone be sufficient to oust the rule. *Wharton v. Baker*, 4 K. & J. 483.

The same rules apply, where the gift to the next of kin is not by way of remainder, but by way of executory limitation.

5. Thus, in a gift to A. for life, where A. is sole next of kin at the date of the will and death, and then to her children, or to A. absolutely, and, if she dies without children, or under twenty-one, to the testator's next of kin, the next of kin are ascertained at the testator's death. *Lang's Will*, 9 W. R. 589; *Murphy v. Donegan*, 3 J. & Lat. 534; *Baker v. Gibson*, 12 B. 101; *Harrison v. Harrison*, 28 B. 21; *Michell v. Bridges*, 13 W. R. 200; see *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 14 Sim. 549.

The case is, however, different, if the gift is not to next of kin, but to the "nearest of kin of my own family," or to relations. *Clapton v. Bulmer*, 5 M. & Cr. 108. In the former case the intention is to let the property go as the law would give it, in the latter to make a complete disposition by the will to a particular class contemplated by the testator, though, owing to the vagueness of the description, the Courts may be compelled to have recourse to the statute, that the gift may not be void for uncertainty.

6. And, even if the gift be to a class of persons, who must be the testator's next of kin, if any survive him, and if they die without issue to his next of kin, the next of kin are ascertained at his death. *Seifferth v. Badham*, 9 B. 372.

The testator may of course direct the class of next of kin to be ascertained at any time or in any manner he chooses. *Pinder v. Pinder*, 28 B. 44; *White v. Springett*, 4 Ch. 300.

Effect of words of futurity in ascertaining the class.

The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A. for life and after his death for such persons, as shall be my next of kin. *Holloway v. Holloway*, 5 Ves. 399; *Doe v. Lawson*, 3 East, 278; *Rayner v. Mowbray*, 3 B. C. C. 234.

But, if the gift is, after the decease of the tenant for life, to such persons as shall *then* be my next of kin, the word "*then*" must refer to the death of tenant for life. *Long v. Blackall*, 3 Ves. 486; *Wharton v. Barker*, 4 K. & J. 483.

But it must be clear, that the word "*then*" is used temporally and not as equivalent to thereupon, and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, "to such persons as would by virtue of the statutes for the distribution of intestates' estates have become and been then entitled thereto in case I had died intestate." *Bullock v. Downes*, 9 H. L. 1; *Doe v. Lawson*, 3 East, 278; *Cable v. Cable*, 16 B. 507; *Wheeler v. Adams*, 17 B. 417; *Fletcher v. Fletcher*, 3 D. F. & J. 775.

Gifts to next of kin of a deceased person.

Where the gift is to next of kin of a person dead at the date of the will, the class is ascertained at the testator's death. *Phillips v. Evans*, 4 De G. & Sm. 188.

And the rule would be the same if the person, whose next of kin are the legatees, is not dead at the date of the

will, but dies in the testator's lifetime. *Vaux v. Henderson*, 1 J. & W. 388; *Gryll's Trusts*, 6 Eq. 589.

But this rule gives way to an intention that the next of kin of the deceased person are to be ascertained at his death. *Ham's Trust*, 2 Sim. N. S. 106; 15 Jur. 1121.

And, if the gift is to the next of kin of a person, who survives the testator, the class is ascertained at the death of that person. *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Jacobs v. Jacobs*, 16 B. 557; *Markham v. Ivatt*, 20 B. 579.

Next of
kin of a
living
person.

REPRESENTATIVES.

The words representatives, legal representatives, personal representatives, or legal personal representatives, must, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. *Crawford's Trust*, 2 Dr. 230; *Hinchcliffe v. Westwood*, 2 De G. & Sm. 216; *Dixon v. Dixon*, 24 B. 129; *Re Turner*, 2 Dr. & Sm. 501; *Smith v. Barnaby*, 2 Coll. 728; *Wyndham's Trust*, L. R. 1 Eq. 290; *Alger v. Parrott*, 3 Eq. 328; *Best's Settlement*, 18 Eq. 686.

Gift to re-
presenta-
tives.

If, however, there is an indication of intention that the representatives are to take beneficially and not in any fiduciary capacity, the words can hardly be referred to executors or administrators, and they will generally mean statutory next of kin, including a widow: *Cotton v. Cotton*, 2 B. 67; *Smith v. Palmer*, 7 Ha. 225; *Holloway v. Radcliffe*, 23 B. 163; but not a husband: *King v. Cleveland*, 26 B. 166, 4 De G. & J. 477. And it would seem by analogy to the case of heirs that the statute would fix the proportions as well as the persons, and that *Walker v. Marquis of Camden*, 16 Sim. 329, would not now be followed.

In what
cases repre-
sentatives
mean next
of kin.

1. If the gift is substitutional, as, for instance, to A. or his legal representatives, or even to A., and if he dies before me to his representatives, there is an *à priori*

Substitu-
tional gift.

improbability that the testator meant to benefit the estate of the legatee if he died in his own lifetime, while the legatee himself could derive no benefit from the legacy unless he survived the testator, and therefore representatives will be read as equivalent to statutory next of kin. *Bridge v. Abbott*, 3 B. C. C. 224; *Cotton v. Cotton*, 2 B. 67.

And if the gift is to several related persons, or their respective representatives, representatives will mean descendants: *Styth v. Monro*, 6 Sim. 49. See *Horsepool v. Watson*, 3 Ves. 383; *Atherton v. Crowther*, 19 B. 448.

2. Where there is a prior life estate the reasons for construing "legal representatives" as next of kin do not apply.

The substitutional words may be considered as inserted merely *ex abundanti cautela*, to provide for the death of the legatee in the lifetime of the tenant for life. *In re Crawford*, 2 Dr. 230, 242; *Re Henderson*, 28 B. 656; *Hinchcliffe v. Westwood*, 2 De G. & S. 216; *Chapman v. Chapman*, 38 B. 556; *Re Turner*, 2 Dr. & Sm. 501.

The same is the case where there is a direct gift to A. or his personal representatives, but the time of payment is postponed: *Thompson v. Whitelock*, 4 De G. & J. 490; or a gift to A., and if he dies before the whole is expended to his representatives. *Dixon v. Dixon*, 24 B. 129.

Words of
distribu-
tion.

3. If there are words of distribution, such as "to and amongst," or "share and share alike," and similar expressions, showing that the "representatives" are to take beneficially, the legacy will go to the statutory next of kin. *King v. Cleveland*, 4 De G. & J. 477; *Baines v. Ottey*, 1 M. & K. 465; *Smith v. Palmer*, 7 Ha. 225.

This, however, does not apply where the gift being to the representatives of several persons who take life interests, the words of distribution can be referred to the stirpes. *Wing v. Wing*, 24 W. R. 878.

4. If the words executors and administrators have been used in other parts of the will, this is an argument to show, that representatives must mean something else. *Jennings v. Gallimore*, 3 Ves. 146; *King v. Cleveland*, 4 De G. & J. 477; *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Marquis of Camden*, 16 Sim. 329; *Briggs v. Upton*, 7 Ch. 376.

Where both the words executors and representatives occur.

5. And, it seems, a direction to pay to personal representatives, where an executor is appointed, would be a strong argument in favour of next of kin. *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makin*, 6 Sim. 148; *Jennings v. Gallimore*, 3 Ves. 146. See *Briggs v. Upton*, *sup.*

Direction to pay to representatives where an executor is appointed.

6. The same result will follow, if there are words added to the term "representatives" inconsistent with the meaning "executors or administrators", such as "personal representatives or next of kin:" *Phillips v. Evans*, 4 De G. & Sm. 188; or "such persons as would be the personal representatives of my daughter in case she had died unmarried:" *Gryll's Trust*, 6 Eq. 589; or "legal personal representatives at the time of her death:" *Robinson v. Evans*, 22 W. R. 199; *Long v. Blackall*, 3 Ves. 486; or "next legal or personal representatives." *Booth v. Vicars*, 1 Coll. 6; *Stockdale v. Nicholson*, 4 Eq. 359.

Where the term representatives is coupled with explanatory words.

Whether, in this latter case, the next of kin proper or the statutory next of kin take, see *Booth v. Vicars*, *supra*; *Stockdale v. Nicholson*, *supra*.

A gift to personal representatives *per stirpes*, and not *per capita*, has been held to mean descendants. *Atherton v. Crowther*, 19 B. 448.

For a direction to pay to "legal representatives according to the course of administration," see *Jennings v. Gallimore*, 3 Ves. 146; *Briggs v. Upton*, 7 Ch. 376.

It would seem, that the addition of the word assigns in a substitutional gift to heirs or representatives would make

Effect of the word assigns.

it impossible to construe these words as equivalent to next of kin. *Grafftey v. Humpage*, 1 B. 46 ; *Waite v. Templer*, 2 Sim. 524.

EXECUTORS.

Whether a
substitu-
tional gift
to executors
goes to the
next of
kin.

There is some doubt, whether a gift to A., and in case of his death to his executors or administrators, will go to A.'s executors in the event of his death before the testator. In *Palin v. Hills*, 1 M. & K. 470, it was held that executors in such a case must mean next of kin. This case has, however, been frequently questioned, and is closely hedged round by hostile cases, though it cannot be said to be overruled. At any rate, if there is an intention shown to benefit the estate of A., executors will be construed strictly.

There was such an intention in *Long v. Watkinson*, 17 B. 471, where the bequest was, in the event of the legatees dying in the testator's lifetime to the executors they may appoint, thus excluding next of kin who derive their title under an intestacy.

The same was the case in *Re Seymour's Trusts*, Johns. 472, where the gift was to children living at the death of A., and to the executors of those who should be then dead leaving children, thus showing an intention to benefit the children of those dead.

And in *Maxwell v. Maxwell*, 1. R. 2 Eq. 478, the construction was assisted by a direction to pay money due to the same legatees under an appointment to them or their executors. See, too, *Aspinall v. Duckworth*, 35 B. 307.

Of course where there is a future gift to A. or his executors the word executors will be treated as inserted to provide for the death of the donee before the time of vesting in possession. See *Stocks v. Dodsley*, 1 Kee. 325.

Executors
taking sub-
stitution-

It appears to be now settled notwithstanding *Evans v. Charles*, 1 Anstr. 128, that executors taking substitu-

tionally take the property to be administered as part of the assets of the original legatee. *Stocks v. Dodsley*, 1 Kee. 325; *Leake v. Macdowell*, 33 B. 238.

ally take trust for the next of kin.

A general or specific legacy given by a testator to his executors, whether under the title of executors or not, is *prima facie* given to them in that character, and therefore they are not entitled to the legacies, if they decline or are incapable of undertaking the office. *Reed v. Devaynes*, 2 Cox, 285, 3 B. C. C. 95; *Calvert v. Sibbon*, 4 B. 222; *Hanbury v. Spooner*, 5 B. 630; *Hawkins' Trust*, 33 B. 570; *Piggott v. Green*, 6 Sim. 72; *Slaney v. Watney*, L. R. 2 Eq. 418.

Gifts to the testator's executors only go to them if they accept the office.

To entitle an executor to receive his legacy, it is sufficient, if he either proves the will, which he may do at any time before the estate is fully administered: *Hollingsworth v. Grassett*, 15 Sim. 52; *Angermann v. Ford*, 29 B. 349; or if he acts as executor: *Harrison v. Rowley*, 4 Ves. 212; *Lewis v. Matthews*, 8 Eq. 277. And it seems, that if the legacy is directed to be paid within twelve months, and there is nothing to show, that the executor refuses to act, he is entitled to his legacy, if he survives the twelve months. *Brydges v. Wotton*, 1 V. & B. 134.

What is a sufficient acceptance of the office.

But if the executor acts fraudulently, the mere taking out probate will not entitle him to his legacy. *Harford v. Browning*, 1 Cox, 302.

The presumption, that a legacy to an executor is given to him in that character for his trouble, may be rebutted:

In what cases the executor is entitled though he does not act.

1. If some other motive is expressed, as if the gift is to "my friend and executor." *Re Denby*, 3 D. F. & J. 350; *Dix v. Reed*, 1 S. & St. 237; *Burgess v. Burgess*, 1 Coll. 367; *Bubb v. Yelverton*, 13 Eq. 131.

2. If the gifts to the executors are unequal in amount, or a legacy is given to one and not the other. *Cockerell v. Barber*, 2 Russ. 585; *Jewis v. Lawrence*, 8 Eq. 345; *Wildes v. Davies*, 1 Sm. & G. 475.

8. The presumption does not arise if the gift is of residue. *Parsons v. Saffery*, 9 Pr. 578; *Griffith v. Pruen*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264.

Whether a gift of residue to executors is beneficial or in trust.

Whether a gift of residue to executors is a gift to them for their own benefit, or whether they take in trust for the next of kin depends on the general scheme of the will, and is not affected by the statute 1 Will. 4, c. 40. *Williams v. Arkle*, *infra*.

Thus the following circumstances are in favour of the executors taking beneficially:—

If the gift is not to the executors as such, but by name. *Williams v. Arkle*, L. R. 7 H. L. 606; *Re Henshaw*, 12 W. R. 1189; 34 L. J. Ch. 98; *Hillersden v. Grove*, 21 B. 518.

If the gift is subject to certain payments. *Parsons v. Saffery*, 9 Pr. 578.

On the other hand, the fact that prior legacies have been given to them, or that the bequest is to them as joint tenants, is against their right to the beneficial interest, though not alone conclusive. *Gibbs v. Rumsey*, 2 V. & B. 294; *Re Henshaw*, *sup.*; *Saltmarsh v. Barrett*, 3 D. F. & J. 279; see *Buckle v. Bristow*, 13 W. R. 68.

And a direction that the executors are to retain their costs would, it seems, show that they were not to take beneficially. *Saltmarsh v. Barrett*, *sup.*

But a reimbursement clause, where there are continuing trusts, will not have this effect. *Romans v. Mitchell*, 15 W. R. 552.

So where there is no gift to the executors, a direction that they, their heirs, successors, representatives, or descendants may apply and distribute the same as to them may appear just, makes them trustees for the next of kin. *Neo v. Neo*, L. R. 6 P. C. 381; see *Barrs v. Fewkes*, 12 W. R. 666, 13 Ib., 987.

CHAPTER XVII.

GIFTS TO CHARITABLE USES.

I. WHAT ARE CHARITABLE GIFTS.

CHARITY, in the legal sense, does not necessarily imply relief of the poor. The stat. 43 Eliz. c. 4, defines various kinds of charities. But generally it may be said every gift for a public purpose, local or general, is charitable. See cases cited in the note to *Loscombe v. Wintringham*, 13 B. 87. Instances of charitable gifts.

Thus gifts for the advancement of education and learning in every part of the world: *Whicker v. Hume*, 7 H. L. 124; for the glory of God in the spiritual welfare of His creatures: *Townshend v. Carus*, 3 Ha. 257; *Powerscourt v. Powerscourt*, 1 Moll. 616; for the advancement of Great Britain: *Nightingale v. Goulbourne*, 5 Ha. 484, 2 Ph. 594; to any religious institution or purposes: *Wilkinson v. Lindgren*, 5 Ch. 570; or for charities and other public purposes in a certain parish: *Dolan v. Macdermot*, 3 Ch. 676, are charitable.

So, too, gifts for any educational or religious purpose, not contrary to morality or the law, are charitable. *Thornton v. Howe*, 31 B. 14; *Beaumont v. Oliveira*, 4 Ch. 309.

For the construction of a gift to the hospitals of London, see *Wallace v. A.-G.* 33 B. 384.

A bequest for objects of liberality or benevolence is not charitable: *Morice v. Bp. of Durham*, 9 Ves. 399, 10 Bequest for purposes of liberality

or bene-
volence is
not charit-
able.

Ves. 521 ; *James v. Allan*, 3 Mer. 17 ; nor is a gift for
“ purposes of general utility :” *Kendall v. Granger*, 5 B.
300.

Private
charity.

And a bequest for private charity is void. *Ommaney v.
Butcher*, T. & R. 260.

What is a
charitable
society.

A bequest to a voluntary society existing for charitable
purposes is charitable. *Cocks v. Manners*, 12 Eq. 574.

Voluntary
association
existing for
private
purposes of
its mem-
bers is not
charitable.

But a gift to a similar society for the use and benefit
of the society is not charitable, the object being not to
benefit the charitable objects of the community, but the
members of it themselves. *Stewart v. Green*, 1 R. 5 Eq.
470.

A gift to a voluntary society existing merely for pur-
poses of religious intercourse and edification of its mem-
bers is not charitable. *Cocks v. Manners, supra*.

Nor is a similar gift to a society existing merely for
the mutual benefit of its members. *In re Clark's Trust*,
1 Ch. D. 497 ; *Thompson v. Shakespeare*, Jo. 612, 1 D.
F. & J. 399 ; *Carne v. Long*, 2 D. F. & J. 75.

Gift to
build or
repair a
tomb is not
a charity.

A gift to build or repair the tomb of the testator or
his family, not within a church, is not charitable. *Mel-
lick v. President of the Asylum*, Jac. 180 ; *Lloyd v. Lloyd*,
2 Sim. N. S. 255 ; *Adnam v. Cole*, 6 B. 353 ; *Rickard v.
Robson*, 31 B. 244 ; *Hoare v. Osborne*, L. R. 1 Eq. 585.

Nor is such a gift within the statute 48 Geo. 3, c. 108.
Re Rigley's Trust, 15 W. R. 190, 36 L. J. Ch. 147.

Such a gift, therefore, if it involves a perpetuity, is
void. *Rickard v. Robson, sup.* ; *Yeap Cheah Neo v. Ong
Ching Neo*, L. R. 6 P. C. 381.

Gift to re-
pair the
fabric of a
church is
charitable.

But bequests to repair the fabric of the church, or
even the ornaments within it, such as a monument or
tomb, are charitable. *Hoare v. Osborne*, L. R. 1 Eq.
585.

Position of
Dissenters,
Roman

Dissenters, Roman Catholics, and Jews are, as re-
gards bequests for charitable purposes, on the same

footing as the Established Church. 1 W. & M. 18; 2 & 3 Will. 4, c. 115, s. 1; 9 & 10 Vict. c. 59; *A.-G. v. Pearson*, 3 Mer. 353, 405.

Catholics, and Jews, as regards charitable gifts.

But the statutes removing religious disabilities have not affected bequests to superstitious uses.

Thus bequests to priests for offering masses for the souls of the dead are void, notwithstanding 2 & 3 Will. 4, c. 115, and go to the next of kin. *West v. Shuttleworth*, 2 M. & K. 684; *Heath v. Chapman*, 2 Dr. 417. See, however, *Re Michel's Trusts*, 28 B. 39.

Superstitious uses.

As to the application of the doctrine of superstitious uses to British Colonies, see *Yeap Cheah Neo v. Ong Ching Neo*, L. R. 6 P. C. 381, and the authorities there quoted.

Gifts for the relief of aged, impotent, and poor people are enumerated as charitable by the statute 43 Eliz. c. 4. See *Nash v. Morley*, 5 B. 177; *Thompson v. Corby*, 27 B. 649.

Gifts for the relief of aged, impotent, and poor people.

But none of these words are necessary to constitute a charitable gift: thus, a gift for the widows and orphans of a parish, or the widows and children of the seamen of Liverpool, is charitable. *A.-G. v. Coombe*, 2 S. & St. 93; *Powell v. A.-G.*, 3 Mer. 48.

On the question whether a gift to poor relations is charitable:—

Gifts to poor relations.

1. When the gift is of a lump sum immediately distributable, the cases are very unsatisfactory.

1. Of a lump sum immediately distributable.

a. In several cases it has been held that a gift to poor relations is to be confined to statutory next of kin, thus implying that the gift is not charitable, since, if it were, no question of uncertainty could have arisen. *Carr v. Bedford*, 2 Ch. Rep. 146; *Griffith v. Jones*, *ib.* 394, anno 1694; *Widmore v. Woodroffe*, Amb. 636.

On the other hand, relations were not so restricted

in *A.-G. v. Buckland*, cit. Amb. 71, 1 Ves. sen. 231; and *Mahon v. Savage*, 1 Sch. & Lef. 111.

In *Edge v. Salisbury*, Amb. 70, S. C. nom. *Goodynge v. Goodynge*, 1 Ves. sen. 230, Belt, 128, where the words were "nearest relations," of course only next of kin could take.

b. In *Brunsdon v. Woolridge*, Amb. 507, 1 Dick. 380, where the will was dated in 1757, and was therefore, since the Mortmain Act, a gift of *realty* to such poor relations as A. should think objects of charity, was held valid, and therefore not charitable; and see *Thomas v. Howell*, 18 Eq. 198. But *quære* whether these cases are satisfactory, and whether a gift to poor relations would not now be considered charitable.

2. Of an annual sum.

2. If, however, the gift is not of a sum distributable at once but of an annual sum, or if the testator has contemplated a perpetuity, the gift is charitable and not confined to statutory next of kin. *Isaac v. Defries*, 17 Ves. 373 n.; *A.-G. v. Price*, 17 Ves. 871; *White v. White*, 7 Ves. 423; *Hall v. A.-G.*, 2 Jarm. on Wills, 114; *Gillam v. Taylor*, 16 Eq. 581.

A direction to distribute rents among certain named families as they may need, has been held not to be a charity. *Lilley v. Hay*, 1 Ha. 580; *sed quære*.

Gifts in respect of an office.

In some cases the question arises, whether a bequest is given in respect of a certain office and is therefore charitable, or whether the office is merely used to describe the person.

Thus, a gift to A., minister of a certain church, is not charitable. *Doe d. Phillips v. Aldridge*, 4 T. R. 264; *Donnellan v. O'Neill*, 1 R. 5 Eq. 523.

But a gift to A., minister of a chapel, and his successors for ever, is charitable. *Thornber v. Wilson*, 3 Dr. 245; see *Robb v. Bp. Dorian*, 1 R. 9. C. L. 483.

Similarly, a gift for the benefit of Roman Catholic

priests in or near London, is charitable. *A.-G. v. Gladstone*, 13 Sim. 7, 1 Ph. 290.

It has, however, been held that a gift to ten poor clergymen to be selected by a trustee, is not charitable. *Howell v. James*, 18 Eq. 198; and see *A.-G. v. Baxter*, 1 Vern. 248, 2 Vern. 104, explained in 7 Ves. 76.

A bequest to the trustees of a charity for a purpose to be declared, which the testator never does declare, affords no inference that the purpose was charitable, and is therefore void. *Corporation of Gloucester v. Wood*, 8 Ha. 131, 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419.

Gift to trustees of a charity without more is not charitable.

II. THE DOCTRINE OF CY PRÈS.

1. If there is a gift to a particular charitable society by name, and the society has existed, but at the time of the testator's death has ceased to exist, the legacy fails. *Clark v. Taylor*, 1 Dr. 642; *Marsh v. Means*, 3 Jur. N. S. 790; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowland*, 3 Giff. 617; *Fisk v. A.-G.*, 4 Eq. 521.

Gift to a particular charitable society may fail by lapse.

If, however, the charity exists at the testator's death, but expires before the estate is administered, the legacy goes to charitable purposes *cy près*. *Hayter v. Trego*, 5 Russ. 113.

Gift to a society for a charitable object will not fail by lapse.

And, if the bequest to the society is expressed to be for a charitable object, the failure of the trustee will not destroy the charitable gift. *Templemoyle School*, 1 R. 4 Eq. 295; *Carbery v. Cox*, 3 Ir. Ch. 231; *Marsh v. A.-G.*, 2 J. & H. 61.

If the society is misdescribed, the court will, if possible, discover from surrounding circumstances which object was intended. *Wilson v. Squire*, 1 Y. & C. C. 654; *Bunting v. Marriott*, 19 B. 163; *Kilvert's Trusts*, 12 Eq. 188, 7 Ch. 170; see *Coldwell v. Holme*, 2 Sm. & G. 31.

Misdescription of a charitable society.

If, however, there is no existing charitable society

sufficiently, or there are several equally, answering the description, the gift will not be void, but will be applied *cy près* to charitable purposes, or be divided among the several claimants. *Simon v. Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Loscombe v. Wintringham*, 13 B. 87; *Re Maguire*, 9 Eq. 632; *Re Alchin's Trusts*, 14 Eq. 230.

Gift for a definite charitable object fails if the object is impossible.

2. A gift for a clearly-defined and particular charitable object, as to build a church in a particular place, will fail if the object becomes impossible: *A.-G. v. Bishop of Oxford*, 1 B. C. C. 444 n.; *Cherry v. Mott*, 1 M. & C. 123; *Russell v. Kellett*, 3 Sm. & G. 264; see, however, as to the limits of this doctrine, *A.-G. v. Bowyer*, 3 Ves. 724; *Abbott v. Fraser*, L. R. 6 P. C. 96.

The court will direct an inquiry as to the possibility of effecting the object.

In such a case it seems the court will retain the fund for a time and direct an inquiry as to the possibility of carrying out the bequest. *A.-G. v. Bishop of Chester*, 1 B. C. C. 444; *Baldwin v. Baldwin*, 22 B. 419; *Sinnott v. Herbert*, 7 Ch. 232; *Chamberlayne v. Brockett*, 8 Ch. 206; see, too, *Abbott v. Fraser*, L. R. 6 P. C. 96.

Gift to charity upon an event too remote is void.

Though, on the other hand, if the gift to the charity is expressly made upon some event which is too remote, the gift would be void; as, for instance, a gift of a sum of money to build almshouses, when land should be given. *Chamberlayne v. Brockett*, *supra*.

Discretion to trustees to apply the whole to charity or other indefinite objects.

3. Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity, and on the other hand the other object is void for uncertainty. *Williams v. Kershaw*, 5 L. J. Ch. 84, 5 Cl. & F. 111; *James v. Allen*, 8 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521; *Ommaney v. Butcher*, T. & R. 260; *Vezey v. Jamson*, 1 S. & St.

69; *Kendall v. Granger*, 5 B. 300; *Thompson v. Thompson*, 1 Coll. 398.

Whether the result would be the same, where the whole might have been applied by the trustees either to charity or some other definite and ascertained object, seems uncertain. *Down v. Worrall*, 1 M. & K. 561; a case of very doubtful authority.

But, if the bequest is such, that a portion must be applied to charity, the gift is good, although the charitable trust may be coupled with other trusts, which are void for uncertainty. And in such a case the gift will either be equally divided among the several objects, including those which are void, as to which the gift will fail *pro tanto*: *Doyley v. A.-G.*, 4 Vin. 485, 7 Ves. 58 n.; *Salisbury v. Denton*, 3 K. & J. 529; *Crafton v. Frith*, 20 L. J. Ch. 198; *Hoare v. Osborne*, L. R. 1 Eq. 585; see, too, *Re Hall's Charity*, 14 B. 115; or, if it is possible to estimate the amount, an inquiry will be directed, how much ought to be given to each. *Adnam v. Cole*, 6 B. 353.

If part must be applied in charity, the court will ascertain the amount.

4. If it is clear that the testator intended to give to charity generally, the bequest will not fail:

Where there is a general charitable intent, the gift is applied *cy pres*.

a. by the failure of the testator to appoint the particular objects he intends to benefit, though the bequest may be to such charitable uses as he shall appoint. *Mills v. Farmer*, 1 Mer. 55; *Commissioners of Charitable Donations v. Sullivan*, 1 D. & War. 501.

b. or by reason of the death, revocation of the appointment, or refusal to act of persons in whom a similar power has been vested. *Moggridge v. Thackwell*, 7 Ves. 36, 13 V. 416; *White v. White*, 1 B. B. C. 12; *A.-G. v. Boulton*, 2 Ves. jun. 380, 3 Ves. 220.

c. or by the failure or non-existence of the particular objects he has pointed out. *Loscombe v. Wintringham*, 13 B. 87; *Hayter v. Trego*, 5 Russ. 113; *Reeve v. A.-G.*, 3 Ha. 191.

d. or even by the fact that some of the objects specified are void. *Fisk v. A.-G.*, 4 Eq. 521; *Dawson v. Small*, 18 Eq. 114.

e. or by the fact, that the bequest is to be applied to a particular object at a future time beyond the limits of perpetuity. *Chamberlayne v. Brockett*, 8 Ch. 206.

Whether particular charitable gifts which fail fall into the residue which is also given to charity.

Where there is a general charitable intention, particular gifts to charity will be applied *cy près*, and will not fall into the residue, though the residue itself may be given to a charitable object, unless the particular gifts are expressly directed to fall into the residue upon failure of the charitable objects to which they are given. *Lyons v. Advocate-General of Bengal*, 1 App. C. 91.

Whether the increase in value of rents and profits given to charity goes to the same object.

5. Where the whole of the rents and profits of land are given to charity, but the objects pointed out do not exhaust the fund, the court distributes the surplus *cy près*. *Arnold v. A.-G.*, Shower P. C. 22; *Pieschel v. Paris*, 2 S. & St. 384.

Where the whole rent is given in the first place to charity, the increase also passes.

Where a sum, which in fact amounts to the whole of the rents and profits of certain land, is given to charity, this is in effect a dedication to charity of the land itself, and any increase in the rents and profits goes to the same purposes. *Thetford School Case*, 8 Co. R. 130 b.

Similarly, if the testator has shown an intention to dispose of the whole to charitable purposes, though there may be a residue undisposed of, it will go to the same purposes. *A.-G. v. Drapers*, 2 B. 508.

And where the whole rents are given in certain proportions among several charitable objects, any increase is apportioned rateably among those objects, subject to the discretion of the court. *A.-G. v. Jesus Coll.*, 29 B. 163; *A.-G. v. Marchant*, L. R. 3 Eq. 424; *Merchant Taylors v. A.-G.*, 11 Eq. 35, 6 Ch. 513; *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1.

When certain pay-

But where rents and profits of land are given to a cor-

poration and certain fixed charitable payments are directed, which do not exhaust the whole, and there is no gift of the residue, the residue belongs to the corporation. *A.-G. v. Mayor of Bristol*, 2 J. & W. 291; *A.-G. v. Brasenose Coll.*, 2 Cl. & F. 295; *A.-G. v. Trinity College*, 24 B. 383.

ments are directed out of the rents for charitable objects, leaving a surplus, the increase does not pass to the charitable objects.

A fortiori, if the surplus is expressly given to the corporation, though the amount of it be specifically mentioned by the testator, any increase, after the payments directed have been made, belongs to the corporation. *Southmolton v. A.-G.*, 5 H. L. 1; *Mayor of Beverley v. A.-G.*, 6 H. L. 310; *A.-G. v. Dean of Windsor*, 8 H. L. 369.

If, among the particular payments directed, some are not charitable, but are to be made to individuals and cannot have been intended to abate, there is an additional argument that none of the particular payments were either to abate or to increase, and that the surplus, whatever it might be, was to go to the donees in trust. *A.-G. v. Cordwainers*, 8 M. & K. 534; *Mayor of Beverley v. A.-G.*, 6 H. L. 310.

On the other hand, if the surplus undisposed of is insignificant, and there is a direction, that the particular payments are to abate proportionally in the event of depreciation of the property, the inference arises, that they were in like manner to share proportionally in any increase. *Mercers' Co. v. A.-G.*, 2 Bl. N. S. 165.

III. ADMINISTRATION OF CHARITABLE GIFTS.

When the bequest is to an existing charitable institution, the bequest is left to be administered as part of the funds of that institution. *Society for P. G. v. A.-G.*, 3 Russ. 142; *Wellbeloved v. Jones*, 1 S. & St. 43.

A gift to a charitable institution is administered by the institution.

But if the bequest is to an existing charitable institu-

tion for purposes other than the purposes for which it exists, the court will administer the bequest by a scheme before the master, *ib.*

A gift to trustees for charitable purposes is administered by the court.

And, generally, wherever trustees are interposed by the testator, his object will be carried out by the court by a scheme before the Chief Clerk; but if no trustees are interposed the charity is administered under the Sign Manual. *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Abp. of Canterbury*, 14 Ves. 364.

Gift to foreign trustees for a foreign charity.

If, however, there is a gift to foreign trustees for charitable purposes in a foreign country and the trustees disclaim, the court has no power to settle a scheme, and the gift fails. *A.-G. v. Sturge*, 19 B. 597; *New v. Bonaker*, 4 Eq. 655.

Cases in which the discretion of the trustee is not interfered with.

And in some cases, where an annual sum has been directed to be given to a person for his life to be distributed in charity, the court has refused to interfere with the discretion of the trustee by settling a scheme. *Bennett v. Honywood*, Amb. 708; *Waldo v. Cayley*, 16 Ves. 206; *Horder v. Earl of Suffolk*, 2 M. & K. 59.

IV. WHAT MAY NOT BE GIVEN TO CHARITY.

Statute of Mortmain, 9 Geo. II., c. 36.

By the statute of Mortmain, 9 Geo. II., c. 36, it is enacted, that no hereditaments, corporeal or incorporeal, nor any personal estate to be laid out in the purchase of lands, shall be given for the benefit of any charitable uses whatsoever; and, in effect, all gifts by will of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any

charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, are declared to be null and void.

1. The decisions are numerous as to what is an interest in land within the statute of *Mortmain*.

What is an interest in land within the statute.

Money to arise from the sale of land directed by the testator is clearly within it. *Page v. Leapingwell*, 18 Ves. 463; *British Museum v. White*, 2 S. & St. 595; *Thornber v. Wilson*, 4 Dr. 350; *Incorporated Church Building Society v. Coles*, 5 D. M. & G. 324.

Money to arise from sale of land.

So is the purchase money for land contracted to be sold by the testator, but in respect of which he has a lien at his death. *Harrison v. Harrison*, 1 R. & M. 71.

Lien for purchase money

On the question whether money to arise from the sale of land under an instrument other than the testator's will is within the Act, the cases are not entirely satisfactory.

Where land is given by a first testator on trust for sale and division among several persons, a gift of the proceeds by the will of a second testator, which does not take effect till after the death of the first, is not within the Act, although the property has not in fact been sold before the second testator's death; since the property ought to have been sold, and the second testator, being one of several donees, could not elect to take it as land. *Marsh v. A.-G.*, 2 J. & H. 61; *Lucas v. Jones*, 4 Eq. 73.

Money to arise from sale of land under a prior testator's will.

And the case has been held not within the Act, where leaseholds have been given on trust for sale to pay debts, and have been sold by the executors, in course of administration, after the death of the second testator, though the pure personalty was enough to satisfy the debts: *Shadbolt v. Thornton*, 17 Sim. 49; 13 Jur. 597; but this case is of very doubtful authority. See *Lucas v. Jones*, *supra*.

But if the time for selling the land has not arrived at the death of the second testator: *Brook v. Badley*, 4 Eq. 106, 3 Ch. 672; or if the land has not in fact been sold, and the second testator might have elected to take it as land, the proceeds of the sale are within the Act. *Attorney-General v. Harley*, 5 Mad. 321.

Leaseholds. Further, within the Act are, leaseholds: *Johnston v. Swann*, 3 Mad. 457; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Entwistle v. Davis*, 4 Eq. 272; money secured by mortgage of land: *White v. Evans*, 4 Ves. 21; *Corbyn v. French*, 4 Ves. 418; *Currie v. Pye*, 17 Ves. 462; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; or charged upon land: *Attorney-General v. Harley*, 5 Mad. 821; *Harrison v. Harrison*, 1 R. & M. 71; including equitable mortgages: *Alexander v. Brame*, 30 B. 153; and mortgages of leaseholds: *Chester v. Chester*, 12 Eq. 444; mortgages of rates on occupiers of houses leviable by distress: *Thornton v. Kempson*, Kay, 592; of poor rates: *Finch v. Squire*, 10 Ves. 41; of turnpike tolls and harbour and dock rates: *Knapp v. Williams*, 4 Ves. 429, n.; *King v. Winstanley*, 8 Pr. 180; *Ion v. Ashton*, 28 B. 879; *Alexander v. Brame*, 30 B. 153; and a mortgage of the undertaking, tolls, and rates of a railway has been held within the Act.: *Ashton v. Lord Langdale*, 4 De G. & S. 402; and the same is the case with Metropolitan Board of Works Consolidated Stock: *Cluff v. Cluff*, 2 Ch. D. 222.

Mortgages and charges on land.

Mortgages of rates.

Of tolls.

Metropolitan Board of Works stock.

Mortgage of real and personal property. And though personalty may happen to be included in a mortgage given by will, the bequest will not be apportioned: *Brook v. Badley*, L. R. 3 Ch. 672; nor will there be an apportionment, if the bequest is of a sum charged upon realty and personalty by a prior testator, *ib.*

Arrears of rent due after the testator's death. Similarly, within the statute are arrears of interest due on a mortgage: *Alexander v. Brame*, 30 B. 153; and rent accrued due since the testator's death, on land con-

tracted to be sold: *Edwards v. Hall*, 11 Ha. 1; and a judgment debt, if it is a charge upon realty. *Collinson v. Pater*, 2 R. & M. 344.

Judgment charged on land.

Finally, a voluntary covenant to leave money by will to a charity is in substance a legacy, and is void if the testator leaves only real assets: *Jeffries v. Alexander*, 7 D. M. & G. 525; 8 H. L. 594; if he leaves mixed assets, there will be an abatement in the proportion of the pure to the impure personalty. *Fox v. Lowndes*, 19 Eq. 453.

Voluntary covenant to leave money is void as regards real assets.

Shares in companies, whether incorporated or not, are not within the statute, provided land is held by them only for the common purposes of the undertaking, and this is the case whether the shares are declared to be personal estate or not, provided the right of the shareholder is merely to call for a share of the profits, and not for a specific part of the land itself. *Walker v. Milne*, 11 B. 507; *Myers v. Perigal*, 11 C. B. 90; 2 D. M. & G. 599; *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Hayter v. Tucker*, 4 K. & J. 243; *Entwistle v. Davis*, 4 Eq. 272. *Morris v. Glyn*, 28 B. 218, cannot be considered law.

Shares in public companies are not within the statute

And it makes no difference that the company whose shares are in question, has placed itself in the position of landlord, by letting its land to another company. *Linley v. Taylor*, 1 Giff. 67; 29 L. J. Ch. 534.

But if the land is held in trust for each individual shareholder in proportion to his shares, so that each shareholder has a direct and definite interest in the land, the shares are within the statute. *Baxter v. Brown*, 7 M. & Gr. 198. See *Watson v. Spratley*, 10 Ex. 222.

unless each shareholder is entitled to a definite proportion of land.

Railway debentures, not being mortgages, are not within the Act: *Ashton v. Lord Langdale*, 4 De G. & S. 402^x; nor arrears of rent due at the testator's death:

Railway debentures.

Edwards v. Hall, 11 Ha. 1; 6 D. M. & G. 74; nor

Arrears of rent due at the death.

^x *Holdsworth v. Davenport* 3 Ch. 185

Tenants'
fixtures.

apportioned rent : *Thomas v. Howell*, 18 Eq. 198 ; nor a royalty on minerals : *Brook v. Badley*, 4 Eq. 106 ; nor tenants' fixtures : *Johnston v. Swan*, 3 Mad. 457.

Legacy
duty on a
charitable
legacy
must be
paid out of
pure per-
sonalty.

Finally, legacy duty on a charitable legacy cannot be paid out of impure personalty. *Wilkinson v. Barber*, 14 Eq. 96.

What is
money to
be invested
in land.

2. As to what is a gift of personalty to be laid out in the purchase of land or any interest therein within the Mortmain Act :

Money to
be invested
on real or
mortgage
security.

Money directed to be invested on real securities, or even merely on mortgage security generally, is within the Act. *Baker v. Sutton*, 1 Kee. 224.

The same is the case, if the ultimate object of the bequest is investment in land, though other investments may be authorized in the mean time. *Mann v. Burlingham* 1 Kee. 235 ; *A.-G. v. Hodgson*, 15 Sim. 146.

But not if an option is left to trustees ; for instance, if money is directed to be invested in real or other security. *A.-G. v. Goddard*, T. & R. 348 ; *Graham v. Paternoster*, 31 B. 80 ; *Beaumont's Trusts*, 32 B. 191.

Bequest to
pay off the
mortgage
debt of a
charity.

A bequest of money to pay off a debt secured by mortgage, whether legal or equitable, of land belonging to a charity, is void. *Corbyn v. French*, 4 Ves. 418 ; *Waterhouse v. Holms*, 2 Sim. 162.

But this is not the case where the debt is no charge upon the land. *Bunting v. Marriott*, 19 B. 163.

Gift to
improve,
enlarge, or
repair a
charitable
institution.

A gift to improve, repair, or enlarge an existing charitable institution is valid. *Edwards v. Hall*, 11 H. 1 ; 6 D. M. & G. 74 ; *Hawkins' Trust*, 33 B. 570.

Gift to
build a
charitable
institution
is void.

A gift to build a charitable institution is held *prima facie* to imply a direction to purchase land for the purpose, and is void under 9 Geo. 2, c. 36. *Chapman v. Brown*, 6 Ves. 404 ; *A.-G. v. Parsons*, 8 Ves. 186 ; *Pritchard v. Arbouin*, 3 Russ. 456 ; *A.-G. v. Davies*, 9 Ves. 535 ; *Martin v. Wellsted*, 2 W. R. 657 ; *Longstaff v.*

Rennison, 1 Dr. 28; *Watmough's Trusts*, 8 Eq. 272; *Hawkins v. Allen*, 10 Eq. 246; *Pratt v. Harvey*, 12 Eq. 544.

If, however, an option is given to the trustees, either to build a charitable institution or bestow the money in some other manner which is legal, the bequest is good as regards the legal purpose. *Sorresby v. Hollins*, 9 Mad. 221; *A.-G. v. Whitchurch*, 3 Ves. 141; *Incorporated Society v. Barlow*, 3 D. M. & G. 120; 17 Jur. 217; *Mayor of Faversham v. Ryder*, 18 B. 318; 5 D. M. & G. 350; *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Dent v. Allcroft*, 30 B. 335; *University of London v. Yarrow*, 1 De G. & J. 72.

Discretion to build or apply the money in some legal manner.

And, on similar principles, a bequest of pure and impure personalty to such charities as trustees may select is good, since the power can be exercised in favour of charities exempt from the law of mortmain. *Lewis v. Allenby*, 10 Eq. 668.

A direction to "establish" would it seems *prima facie* imply building, and come under the same rules as a bequest for building. *A.-G. v. Hodgson*, 15 Sim. 146; *Longstaff v. Rennison*, 1 Dr. 28; *Re Clancy*, 16 B. 295; *A.-G. v. Hall*, 9 H. 647; *Dunn v. Bownas*, 1 K. & J. 591; *Tatham v. Drummond*, 4 D. J. & S. 484.

Gift to "establish" a charity.

But, of course, the word may be used in such a context, as to exclude building. *A.-G. v. Williams*, 2 Cox, 387; *Hill v. Jones*, 2 W. R. 657.

And the fact, that an annual sum only is given to establish a school, would apparently go to show that the testator did not contemplate building. *Hartshorne v. Nicholson*, 26 B. 58.

The same is the case with an annual sum given to "provide" a school, which may only mean, that a school is to be hired. *Johnston v. Swann*, 3 Mad. 457; *Crafton v. Frith*, 20 L. J. Ch. 198, 15 Jur. 737.

So, too, a bequest to “found” a chapel implies building. *Hopkins v. Phillips*, 3 Giff. 182.

Gift to
endow a
charity.

On the other hand a gift to “endow” would not, *primâ facie*, authorise building: *Salisbury v. Denton*, 3 K. & J. 529; *Edwards v. Hall*, 11 Ha. 1; *Sinnett v. Herbert*, 7 Ch. 233: though it may be so used as to involve it. *Kirkbank v. Hudson*, 7 Pr. 212.

Evidence
of inten-
tion that
the testa-
tor did not
contem-
plate the
purchase of
land.

But, even though the object of the gift may *primâ facie* imply the purchase of land, it may appear that the testator had no such intention. He may have contemplated the building, as to be erected either on land already in mortmain, or on land to be provided after his death from some other source.

A. Thus, if the testator contemplated land already in mortmain, a gift to build a charitable institution is good. This will be the case—

1. If land already in mortmain is expressly referred to in the will. *Glubb v. A.-G.*, Amb. 373; *Brodie v. Duke of Chandos*, 1 B. C. C. 444 n.
2. If land already in mortmain is impliedly referred to, as by a direction to build in such manner as is consistent with law. *Dent v. Allcroft*, 30 B. 335; *Sewell v. Crewe Read*, L. R. 3 Eq. 60.
3. External evidence may be referred to, in order to show that the testator must have contemplated land in mortmain, though as to the exact amount of evidence necessary for this purpose the cases are not quite consistent. *A.-G. v. Hyde*, Amb. 751; *Giblett v. Hobson*, 3 M. & K. 517; *Booth v. Carter*, L. R. 3 Eq. 757; *Cresswell v. Cresswell*, 6 Eq. 69.

B. When the testator intends the buildings to be erected on land to be supplied from some other source after his death:—

1. It is clear, that a direct inducement offered to any person to give land for the purpose of the building, as, for instance, a bequest to A. to build, if he will give the land is bad. *A.-G. v. Davies*, 9 Ves. 535.
2. If the trustees are directed to beg the land from some person, but their own implied power to purchase remains, the bequest is bad. *Mather v. Scott*, 2 Kee. 172.
3. Where the bequest is to build, with an express direction, that land is not to be bought for the purpose, the bequest is valid, whether made conditional upon land being provided, or without any condition. *Henshaw v. Atkinson*, 3 Mad. 306; *A.-G. v. Williams*, 2 Cox, 387; *Cawood v. Thompson*, 1 Sm. & G. 409; *Philpott v. Governors of St. George's Hospital*, 6 H. L. 838 (overruling *Trye v. Corporation of Gloucester*, 14 B. 173); *Chamberlayne v. Brockett*, 8 Ch. 206.

Upon similar principles, a bequest to the trustees of a charity, which exists only for the purchase of land is void. *Widmore v. Woodroffe*, Amb. 636; *Middleton v. Citheroe*, 3 Ves. 734; *Denton v. Lord J. Manners*, 25 B. 38, 2 De G. & J. 675.

Bequest to a charity, the object of which is to acquire land.

On the other hand, it is good, if it exists for the purchase of land or other objects. *Incorporated Society v. Barlow*, 3 D. M. & G. 120; *Carter v. Green*, 3 K. & J. 591; *Wilkinson v. Barber*, 14 Eq. 96.

The Universities of Oxford and Cambridge, and the Colleges of Eton, Winchester and Westminster, are excepted from the operation of the Mortmain Act. But this exception only authorises devises to these colleges for all or some of the purposes for which they exist, and not upon trust for other charitable objects. *A.-G.*

Universities of Oxford and Cambridge, and Eton, Winchester, and Westminster excepted from

the Act so far as the purposes for which they exist are concerned.

Whether a college takes the legal estate.

v. Tancred, 1 Ed. 10, 1 W. Bl. 90, Amb. 851; *A.-G. v. Whorwood*, 1 Ves. 534; *A.-G. v. Munby*, 1 Mer. 327.

And if there is a good devise of lands to a college for charitable objects, which the college refuses to accept, the object will be carried out *cyprés*. *A.-G. v. Andrew*, 3 Ves. 633.

Before the Wills Act, it seems that a devise to a college did not carry the legal estate, notwithstanding *Benet College v. Bishop of London*, 2 W. Bl. 482, which was decided upon an erroneous interpretation of the stat. 43 Eliz. c. 4, that statute being merely remedial and not intended to authorise what was illegal before. See *Incorporated Society v. Richards*, 1 D. & War. 258.

Whether a devise to a college since the Wills Act would carry the legal estate seems doubtful. See p. 18.

In what cases charities empowered to hold lands may take by devise.

The fact that a charity is empowered by Act of Parliament to hold lands, does not entitle a testator to devise lands to it. *Robinson v. Governors of London Hospital*, 10 Ha. 19; *Nethersole v. School for the Indigent Blind*, 11 Eq. 1; *Chester v. Chester*, 12 Eq. 444.

But where charities are empowered to acquire lands by will, testators are of course entitled to devise lands to them. *Perring v. Traill*, 18 Eq. 88.

But it seems, that such a power to take lands by devise, would not necessarily authorise a bequest of money secured on mortgage. *Chester v. Chester*, *supra*.

Bequest of money to be employed on land devised to charity by the testator.

A bequest of money intended to be employed on premises, the devise of which is void by mortmain, fails. *A.-G. v. Hinxman*, 2 J. & W. 270; *Smith v. Oliver*, 11 B. 481; *Crumpp v. Playfoot*, 4 K. & J. 479; *Green v. Britten*, 42 L. J. Ch. 187.

Secret trust of land in favour of

The Statute of Mortmain cannot be avoided by a secret trust in favour of a charity. *Russell v. Jackson*, 10 Ha. 204.

In such a case, however, the devisee takes the legal estate. *Sweeting v. Sweeting*, 12 W. R. 239.

But a devise of lands on an express trust for charity is void, as regards the legal estate as well, by the statute 9 Geo. 2, c. 36. *Doe d. Burdett v. Wright*, 2 B. & Ald. 710.

charity is bad, but the devisee takes the legal estate.

The statute 43 Geo. 3, c. 108, authorises the devise of specific lands for the purposes therein mentioned, or of goods or chattels to the amount of 500*l.* for the same purposes.

Statute 43 Geo. 3, c. 108.

Under this Act a bequest of 500*l.* towards building a church, if the testator survives the making of the will three months, is good. *Dixon v. Barlow*, 3 Y. & C. Ex. 677; *Girdlestone v. Creed*, 10 Ha. 480.

The Act, however, does not authorise a devise of lands to be sold and the proceeds to be applied towards the purposes of the Act. *Incorporated Church Building Society v. Coles*, 1 K. & J. 145; 5 D. M. & G. 324.

CHAPTER XVIII.

SUCCESSIVE AND CONCURRENT INTERESTS, JOINT TENANCY AND TENANCY IN COMMON.

I. DEVISE TO A CLASS IN TAIL.

Devise to a
class in
tail gives
concurrent
interests,

IN some cases the question has arisen whether the gift is to several persons concurrently, or whether they are intended to take successively; thus a devise to the sons of a person in tail is, *primâ facie*, a gift to a class. *De Windt v. De Windt*, L. R. 1 H. L. 87; *Surtees v. Surtees*, 12 Eq. 400.

unless
there is an
intention
expressed
to keep the
property
together in
one line of
enjoyment.

But, if there is a general intention manifest to keep the estates together in a single line of enjoyment, the members of the class will take successively. *Cradock v. Cradock*, 4 Jur. N. S. 626, 656; *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160.

II. GIFTS TO A PARENT AND CHILDREN.

Gift to
a parent
and chil-
dren, gives
them
concurrent
interests.

IN the same way a gift to a parent and children is *primâ facie* a gift to them concurrently. *Mason v. Clarke*, 17 B. 126; *Sutton v. Torre*, 6 Jur. 234; *Wilson v. Madison*, 2 Y. & C. C. 372; *Beales v. Crisford*, 13 Sim. 592; *Newill v. Newill*, 12 Eq. 432, 7 Ch. 253. See *Cape v. Cape*, 2 Y. & C. Ex. 543.

The fact, that the gift is to the parent in trust for herself and her children, is not sufficient to show, that they are not to take concurrently. *Newill v. Newill*,

7 Ch. 253. See *Curtis v. Graham*, 12 W. R. 998. *Ward v. Grey*, 26 B. 485, probably goes beyond the present tendency of the Court.

But, if there is anything to show, that the parent is to take a different interest from that of the children, he will take for life, with remainder to the children.

What is a contrary intention.

1. If the bequest is to A. and his children as tenants in common, if more than one, showing that the tenancy in common is to apply to children only, the father takes for life: *Doe d. Davy v. Burnsall*, 6 T. R. 30; 1 B. & P. 215, where issue must have meant children by the force of the gift over in default of issue of such issue. See *Doe d. Gilman v. Elvey*, 4 East, 313.

Words of distribution applied to the children only.

2. A devise to A. and his children and the heirs of the parent and children, gives a joint estate in fee, or an estate tail to the parent, according as there are or are not children living at the time of the devise. *Oates d. Hatterly v. Jackson*, 2 Str. 1172; *Underhill v. Roden*, 2 Ch. D. 494.

Words of limitation applied to the children only.

But a devise to A. and his children, and the heirs of the children, would give A. an estate for life with remainder to his children. *Jeffery v. Honywood*, 4 Mad. 398, was decided on this ground, though it would seem the word heirs referred to the parent as well as the children.

3. If the bequest is to a father and his children, and there is a desire expressed, that the whole fund should be settled or secured, a term which would have no meaning as applied to the father's interest as joint tenant, the father takes for life. *Vaughan v. Marquis of Headfort*, 10 Sim. 639; *Combe v. Hughes*, 14 Eq. 415.

Settlement directed of the whole fund.

If a continuing trust is created, which is contemplated as outlasting the parent's life, there is room for a similar argument in favour of a life interest in the parent. *Ogle v. Corthorn*, 9 Jur. 325.

Gift of the whole fund to the separate use.

4. Whether, where the gift is to the separate use of the mother, it will be considered a sufficient indication of intention to cut the interest of the parent down to a life interest is not certain. On the whole, the better opinion seems to be, that where the words creating the separate use apply to the whole fund or legacy, it will be construed as giving the mother a life interest: *Newman v. Nightingale*, 1 Cox, 341; *Froggett v. Wardle*, 3 De G. & S. 685; *Dawson v. Bourne*, 16 B. 29; *Scott v. Scott*, 11 Ir. Ch. 114; *Ogle v. Corthorn*, 9 Jur. 325, in which case the Vice-Chancellor Wigram thought that a gift to the separate use was conclusive against the children participating with their mother. *Combe v. Hughes*, 14 Eq. 415.

On the other hand the cases of *De Witte v. De Witte*, 11 Sim. 41, and *Bustard v. Sanders*, 7 B. 92 (which, however, only followed *De Witte v. De Witte*) are inconsistent with this rule.

Gift of the parent's interest only to her separate use.

Of course if the interest of the mother alone is given to her separate use, no argument in favour of a life estate can be founded upon the separate use. *Fisher v. Webster*, 14 Eq. 283.

The same is the case, if her interest only is directed to cease on marriage. *Izod v. Izod*, 11 W. R. 452.

Division of the whole fund directed at a particular time implies that it is not to be divided before.

5. If upon the marriage of their mother the fund is to be divided among the children, this affords an argument, that it is not to be divided before, and the mother takes for life or till marriage. *Mill v. Mill*, 1 R. 9 Eq. 104.

Effect of gift over of the entire fund if there are no children.

6. If the whole fund is contemplated as remaining undisposed of, if there are no children, if there is a gift over for instance in default of children, the same construction is adopted. *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226. See *Lamplsey v. Blower*, 3 Atk. 396.

7. If the children are contemplated as taking shares in the whole fund by a direction, for instance, that if there is but one child the whole is to go to that child, since the children are to take the whole, the parent to take anything must take a life interest. *Garden v. Poultney*, Amb. 499, 2 Ed. 323; *Audsley v. Horn*, 26 B. 195, 1 D. F. & J. 226.

Children contemplated as taking the whole fund.

8. If the bequest is such, as expressly to include all the children of the parent, and not merely those in being at the period of distribution, it will be construed to give a life estate to the parent, with remainder to the children, since it is a singular intention to impute to the testator that the parent's interest in the estate should continually diminish on the birth of a new child. *Jeffery v. De Vitre*, 24 B. 296; *Jeffery v. Honeywood*, 4 Mad. 398.

Express gift to afterborn children.

9. If the legacy is payable in part at once, and in part at a future period, the parent will take for life, as otherwise different classes of children might take the two portions. *Morse v. Morse*, 2 Sim. 485.

Part of the fund payable at a future period.

10. If in the event of the mother's death before the testator the children are to take unequal shares, the presumption of joint tenancy is apparently rebutted. *Armstrong v. Armstrong*, 7 Eq. 518.

Effect of a gift to the children in unequal shares in certain events.

11. If the children are contemplated as not enjoying the property till after their mother's death, by being called heirs for instance, the parent takes for life only. *Crawford v. Trotter*, 4 Mad. 36; *Ogle v. Corthorn*, 9 Jur. 325; *Wilson v. Vansittart*, Amb. 561.

Words implying that children are not to take till their parent's death.

12. There may be a reference to another gift, to assist the Court in giving the parent a life interest. *French v. French*, 11 Sim. 257; *In re Owen's Will*, 12 Eq. 316.

Reference to other gifts.

13. An executory trust for A. and her children will be settled on A. for life, and afterwards for her children. *In re Bellasis' Trust*, 12 Eq. 218.

Executory trust.

III. JOINT TENANCY AND TENANCY IN COMMON.

Gift to several with words of limitation is a joint tenancy.

Interests of joint tenants need not vest at the same time.

"All and every."

The Court leans to a tenancy in common.

What words create a tenancy in common.

Part or share.

Effect of a gift at twenty-one.

A. What creates a joint tenancy.

A gift to two persons or to a class with words of limitation, *prima facie*, constitutes a joint tenancy between them.

The rule, that the interests of joint tenants must vest at the same time, does not apply to estates raised by use, or to wills. *Macgregor v. Macgregor*, 1 D. F. & J. 63.

Thus a gift to all and every the child or children of A. creates a joint tenancy between them. *Morgan v. Britten*, 13 Eq. 28.

B. What creates a tenancy in common.

1. The Court leans towards a tenancy in common, and will prefer it, when there is a doubt, or the testator has given the legatees a choice between a joint tenancy and tenancy in common. *Booth v. Alington*, 3 Jur. N. S. 835, 27 L. J. Ch. 117, 5 W. R. 811; *Oakley v. Wood*, 16 L. T. N. S. 450.

2. Words of division or distribution, such as "to be divided," or "equally," or "between," or "respectively," make a tenancy in common. *Vanderplank v. King*, 3 Ha. 1; *A.-G. v. Fletcher*, 13 Eq. 128. See *Re Moore's Settlement Trusts*, 10 W. R. 315.

And the use of the word "share" with reference to the interest of the legatees, or even the word "participate," has the same effect: *Ive v. King*, 16 B. 46; *Robertson v. Fraser*, 6 Ch. 696. See *Alloway v. Alloway*, 4 D. & War. 380.

3. And it has been held, that where there is a gift to a class at twenty-one, so that some may take vested and others contingent interests, they take as tenants in common. *Woodgate v. Unwin*, 4 Sim. 129; *Hand v. North*, 12 W. R. 229, 10 Jur. N. S. 7.

4. If there are any incidents attached to the gift inconsistent with a joint tenancy, it will be construed as a tenancy in common :

Incidents inconsistent with a joint tenancy.

If, for instance, one of the objects of the gift is to take the interest of the other, not merely on the death of the latter, but on his death without issue, or on some other contingency. *Ryves v. Ryves*, 11 Eq. 539.

Of course a gift over of the interest of one joint tenant in certain events to a third person can have no such effect. *Edwards v. Jones*, 33 B. 348.

5. Where there is a power to appoint to persons which would authorise a tenancy in common, the Court if compelled to exercise the power, will make the legatees tenants in common. *White's Trusts*, Joh. 656. *Phene's Trusts*, 5 Eq. 346 ; see *Armstrong v. Armstrong*, 7 Eq. 519.

Power to appoint to persons as tenants in common.

6. It would seem, that where a clear executory trust is created by will, for instance, by a direction to make a settlement upon a person and her children, the children would take as tenants in common. *Head v. Randall*, 2 Y. & C. C. 231 ; *Stanley v. Jackman*, 23 B. 450. See *Taggart v. Taggart*, 1 Sch. & L. 84 ; *Synge v. Hales*, 2 Ba. & Be. 499.

Executory trust in favour of a parent and children.

At any rate, this is clearly the case if the ordinary powers and trusts are directed to be inserted in the settlement. *Mayn v. Mayn*, 5 Eq. 150.

But a mere direction to secure a fund in favour of a class will not make them tenants in common. *White v. Briggs*, 2 Ph. 583 ; *Owen v. Penny*, 14 Jur. 359.

7. If there is a gift to parents creating a tenancy in common, and children are substituted for parents dying, the children of each parent take as joint tenants among themselves. *Penny v. Clarke*, 1 D. F. & J. 425 ; *Macgregor v. Macgregor*, 1 D. F. & J. 63 ; *Hodgson's Trusts*, 1 K. & J. 178 ; *Coe v. Bigg*, 1 N. R. 536 ; *Lanphier v. Buck*, 2 Dr. & Sm. 484.

Issue substituted for parents take as joint tenants between themselves,

unless
there are
words of
severance
applicable
to the
issue.

Severance
of joint
tenancy as
regards the
share of
issue sub-
stituted for
their
parent.

But this does not apply if the words of division must be applied to the children as well. *Lyon v. Coward*, 15 Sim. 287; *Shepherdson v. Dale*, 12 Jur. N. S. 156; *Hodges v. Grant*, 4 Eq. 140.

8. If there is a gift to parents in joint tenancy and a direction, that the children of parents dying are to stand in the place of the parents and take their shares, there is with regard to the *stirps* of children so taking a severance of the joint tenancy. *Heasman v. Pearse*, 7 Ch. 275.

CHAPTER XIX.

ESTATES IN FEE AND IN TAIL.

I. WORDS OF LIMITATION PROPER TO PASS THE FEE.

1. A DEVISE to a man and his heirs gives him the fee, though he may be a bastard, and can have therefore only heirs of his body. *Idle v. Cook*, 1 P. Wms. 78.

Devise to
A. and his
heirs.

A devise to A. and his lawful heirs carries a fee. *Simpson v. Ashworth*, 6 B. 412; *Matthews v. Gardiner*, 17 B. 254.

Devise to
A. and his
lawful
heirs.

So, too, a devise to a man, his executors and administrators, gives him the fee. *Rose d. Vere v. Hill*, 3 Burr. 1881.

Devise to
A., his
executors,
and admin-
istrators.

2. The testator may, however, show by explanatory expressions, that he used the word heirs as equivalent to heirs of the body. *Doe d. Jearrod v. Banister*, 7 M. & W. 292; *Jenkins v. Hughes*, 8 H. L. 571; see, too, 4 Mad. 67; *Biddulph v. Lees*, E. B. & E. 289, 6 W. R. 592, 7 W. R. 309.

The tes-
tator may
show that
he meant
by heirs
heirs of the
body.

A devise to the first and other sons of a tenant for life successively and their respective heirs according to priority of birth, followed by a gift over in default of such issue, will give the sons successive estates tail. *Hennessey v. Bray*, 33 B. 96; *Lewis d. Ormond v. Waters*, 6 East, 337.

3. Heirs will be held equivalent to heirs of the body, if there is a limitation over in default of heirs to a person who may be, or to several persons, some of whom may be

Effect of
gift over
in default
of heirs to

a collateral
heir.

collateral heir or heirs to the first taker, the limitation over to a collateral heir showing that by heirs the testator meant heirs of the body. *Webb v. Hearing*, Cro. Jac. 415; *Harris v. Davis*, 1 Coll. 416.

The rule does not apply where the gift over is on failure of issue; therefore a gift to several in fee, and if they die without issue to a collateral heir will, since the Wills Act, give a fee with an executory devise over, as it would before the Act have given an estate tail by force of the gift over being in default of issue, not because it was to a collateral heir. See *Gwynne v. Berry*, 1 R. 9 C. L. 494.

Effect of a
gift over in
default of
issue upon
a prior
devise in
fee.

4. If there is a devise to A., which gives A. the fee, either by express limitation or by construction, followed by a gift over if he dies without heirs of the body or issue, if these words import an indefinite failure of issue, A.'s estate is cut down to an estate tail. *Tracy v. Glover*, cit. 3 Leon. 130; *Denn v. Slater*, 5 T. R. 335; *Dansey v. Griffiths*, 4 Mau. & S. 61; *Tenny v. Agar*, 12 East, 253; *Morgan v. Morgan*, 10 Eq. 99.

If, however, the failure of issue is not an indefinite failure of issue, there is no necessity for this construction, and the gift over will take effect as an executory devise. *Right v. Day*, 16 East, 67; *Doe v. Frost*, 3 B. & Ald. 546; *Parker v. Birks*, 1 K. & J. 156; *Ex parte Davies*, 2 Sim. N. S. 114; *Blinston v. Warburton*, 2 K. & J. 400; *McEnally v. Wetherall*, 15 Ir. C. L. 502; *Coltsman v. Coltsman*, L. R. 3 H. L. 121.

II. WHERE THE FEE WILL PASS WITHOUT WORDS OF LIMITATION.

In what
case a fee
passes
without
words of

A. Wills before the Wills Act.

In wills before the Wills Act a devise of lands to A. without words of limitation gave only an estate for life.

But the Courts are anxious to lay hold of any indication of intention that more than a life estate was meant to pass.

limitation
in wills
before the
Wills Act.

The words "freely to be possessed and enjoyed" will not pass the fee. *Doe d. Ashby v. Baines*, 2 C. M. & R. 23.

1. But the fee passes by the words property or estate, even if accompanied by words of locality. *Doe d. Pottow v. Fricker*, 6 Ex. 510; *Bentley v. Oldfield*, 19 B. 225; *Phillips v. Allen*, 7 Sim. 446; *Coltsman v. Coltsman*, L. R. 3 H. L. 121.

Devise of
property
or estate,

A mere recital, however, of an intention to dispose of all the testator's estates or property is not enough to pass the fee, unless these words are brought down into and incorporated with the devise. *Denn v. Gaskin*, 2 Cowp. 657; *Doe v. Allen*, 8 T. R. 497.

2. So, too, the fee passes by the words moiety, part, share, or similar words. *Doe d. Atkinson v. Fawcett*, 3 C. B. 274; *Paris v. Miller*, 5 Mau. & S. 408; *Manning v. Taylor*, L. R. 1 Ex. 235.

moiety,
part, or
share.

But the moiety, part, or share must exist as such at the date of the devise. *Colclough v. Colclough*, 1. R. 4 Eq. 263.

The rule does not apply to the case of a series of formal limitations, so as to affect one gift in the midst of several life estates. *Re Arnold's Estate*, 33 B. 163.

3. A fee passes, if there is a charge on the devisee personally, or in respect of the property devised, whether the charge be a sum in gross or an annual sum. *Matthews v. Windross*, 2 K. & J. 406; *Pickwell v. Spencer*, L. R. 6 Ex. 190, *ib.*, 7 Ex. 105.

Effect of
a charge
upon the
devisee.

It is immaterial, whether the payment is upon a contingency or not. *Doe d. Thorn v. Phillips*, 3 B. & Ad. 753; *Abrams v. Winshup*, 3 Russ. 350.

And a fee has been held to pass, where a mere discretionary trust was imposed upon the devisee. *Lloyd v. Jackson*, L. R. 1 Q. B. 571, *ib.*, 2 Q. B. 269.

But the fee will not pass, if sums are merely charged upon the land generally and not upon the land in the hands of the devisee ; thus a devise after or subject to certain payments will not carry the fee. *Moor v. Denn d. Mellor*, 1 B. & P. 558, 2 B. & P. 247 ; *Doe d. Sams v. Garlick*, 14 M. & W. 698 ; *Vick v. Sueter*, 3 E. & B. 219 ; *Burton v. Power*, 3 K. & J. 170.

And where there is a devise subject to a charge on the devisee without words of limitation, and another devise in exactly the same words not subject to a charge, the latter will not carry the fee. *Right d. Compton v. Compton*, 9 East, 267 ; *Morris v. Lloyd*, 33 L. J. Ex. 202.

An express estate for life will of course not be enlarged by a charge. *Willis v. Lucas*, 1 P. Wms. 472 ; *Doe d. Bardett v. Wrighte*, 2 B. & A. 710.

Nor will an indefinite devise, if it appears from the will, that only a life estate was meant to be given. *Bolton v. Bolton*, L. R. 5 Ex. 145.

Gift over
inconsis-
tent with a
life estate.

4. A fee passes, if the land is given over in a manner inconsistent with a life estate.

a. Thus a fee is implied from a devise over upon death of the devisee under 21, or at any other specified time. *Doe v. Cundall*, 9 East, 400 ; *Frogmorton v. Holiday*, 3 Burr. 1618, 1 W. Bl. 535 ; *Re English*, 2 Ir. Com. L. 284 ; *Burke v. Annis*, 11 Ha. 232.

b. A fee is also implied if the gift over is upon death before a certain age, and without issue living at the death. *Toovey v. Bassett*, 10 East, 460 ; *In re Harrison's Estate*, L. R. 5 Ch. 408.

It makes no difference whether the devise is vested or contingent. *In re Harrison's Estate*, *supra*.

Effect on a
devise to
children of
a gift over
if the
parent dies
without
children.

c. It seems doubtful whether, where there is an indefinite devise to children, a mere gift over, if the parent dies without such issue, will give the children the fee. See *Doe d. Cannon v. Rucastle*, 8 C. B. 876.

But if the fee is then expressly given over, it seems the children would also take the fee. *Robinson v. Gray*, 9 East, 1; *Hutchinson v. Stephens*, 1 Kee. 240; see, too, *Re Pollard's Trusts*, 3 D. J. & S. 541.

5. A devise of rents and profits or of the income of lands carried an estate for life in the lands before the Wills Act, and since the Act it carries the fee. *Mannox v. Greener*, 14 Eq. 456.

Devise of rents and profits carries the fee.

The same is the case with a devise of rents and profits for a time that may last for ever. *Banbury v. Doran*, I. R. 9 C. L. 284.

But a devise of a specific annual sum out of land, though it happens to be the whole amount of the rents and profits, will not carry the land. *Going v. Hanlon*, I. R. 4 C. L. 144.

6. Where property is excepted out of a devise in fee, the exception will carry as large an interest, as the devise out of which it is excepted. *Doe d. Knott v. Lawton*, 4 Bing. N. C. 455, 6 Sc. 303; *Hill v. Rattey*, 2 J. & H. 634; *Bennett v. Bennett*, 2 Dr. & Sm. 266.

Exception carries as large an estate as the property out of which it is excepted.

7. The estate of a *cestui que trust* is commensurate with that of his trustee, and therefore, where land is devised to a trustee and his heirs in trust for a person without words of limitation, the latter takes the fee. *Moore v. Cleghorn*, 10 B. 423, 12 Jur. 591; *Knight v. Selby*, 3 Sc. N. R. 409, 3 M. & Gr. 92; *Challenger v. Shepherd*, 8 T. R. 597; see *Maden v. Taylor*, W. N. 1876, p. 101.

The estate of a *cestui que trust* is commensurate with that of the trustee.

But this does not apply, where the trustees take for the benefit of ulterior devisees as well. *In re Pollard's Estate*, 3 D. J. & S. 541.

B. Now, by the 28th section of the Wills Act a devise without words of limitation passes the fee or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention shall appear by the will.

Effect of the Wills Act in passing the fee.

The fact, that the will contains other devises with words of limitation, will not prevent a devise without such words from passing the fee. *Wisden v. Wisden*, 2 Sm. & G. 396.

Nor will a power given to the devisee to appoint the property generally to her children cut a devise without words of limitation down to a life estate. *Brook v. Brook*, 3 Sm. & G. 280.

Contrary
intention.

But a devise without words of limitation, followed by a devise of the same property to another person with words of limitation, will give the first devisee a life interest only. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

III. WORDS OF LIMITATION PROPER TO PASS AN ESTATE TAIL.

What
words
create an
estate tail.

A. The ordinary mode of limiting an estate tail is by the words "heirs of the body" or "issue."

And a devise to A. and his heirs male, or to A. and his heirs lawfully begotten, is an estate tail. *Baker v. Wall*, 1 Ld. Raym. 185; *Tufnell v. Borrell*, 20 Eq. 194; *Nanjan v. Legh*, 7 Taunt. 85.

Effect of
superadded
words of
limitation
and distri-
bution.

Words of limitation superadded to the words heirs of the body will not cut down the estate tail of the ancestor. *Denn d. Gearing v. Shenton*, Cowp. 410.

Nor will such words as "the elder son of the ancestor to be preferred to the second or younger son," such words merely indicating the notion the testator incorrectly entertained of the descent of an estate tail. *Fetherston v. Fetherston*, 3 Cl. & F. 67.

And probably a devise to A. and the heirs of his body as tenants in common would give A. an estate tail, notwithstanding *Doe d. Strong v. Goff*, 11 East, 668. See 2 Bl. 55, 58, 3 J. & Lat. 54.

To create
an estate
tail the

But the heirs, where the word is to be used as a word of limitation, must be the heirs of the ancestor. There-

fore a devise to the husband for life, with remainder to the heirs of the body of the husband and wife, will not give an estate tail, because no person can be supposed to include in himself the heirs of himself and somebody else. *Fearne*, C. R. 38; see, too, *Allgood v. Withers*, 2 Burr. 110.

inheritance must be limited to the heirs of the body of the ancestor.

But a devise to the husband and wife, with remainder to the heirs of the body of the husband and wife, gives them a joint estate tail. *Fearne*, C. R. 38.

A devise to husband and wife for life, with remainder to the heirs *on* the body of the wife by the husband to be begotten, vests in both an estate tail; but if the remainder be limited to the heirs of the body *of* the wife by the husband to be begotten, the wife alone has an estate tail, the word heirs in the latter case being considered as applied to the wife only. *Alpass v. Watkins*, 8 T. R. 516; *Denn v. Gillott*, 2 T. R. 431; *Frogmorton d. Robinson v. Wharrey*, 2 W. Bl. 728.

Distinction between heirs *of* the body of the wife and heirs *on* the body of the wife begotten.

Similarly, a devise to husband and wife for life, remainder to the heirs of the husband on the body of the wife begotten, gives the husband an estate in special tail. *Roe d. Aistrop v. Aistrop*, 2 W. Bl. 1228.

It follows that a devise to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, gives the wife no estate tail, because the heirs are not applied to her body. *Gossage v. Taylor*, Sty. 325.

Where there is a joint limitation for life to two persons who may by possibility intermarry (even though they may be respectively married already) with remainder to the heirs of their bodies, they take an estate tail.

Effect of limitation to the heirs of the body of several ancestors who may intermarry.

So, too, a devise to a man and the heirs of his body by a second wife gives him an estate tail executed in possession, though the devisee had a wife at the time. *Fearne*, 35. Vent. 228.

And a devise to the wife for life, with remainder to the

Tenant in tail after

possibility
of issue
extinct.

heirs of her body by the testator, where the testator has no issue by his wife, nevertheless makes the wife tenant in tail after possibility of issue extinct. *Platt v. Powles*, 2 Mau. & S. 65.

Devise in
tail to
several per-
sons who
cannot
intermarry.

But a devise to several persons who cannot marry, and the heirs of their bodies, gives them joint estates for life with several inheritances in tail. *Tufnell v. Borrell*, 20 Eq. 194; *Fearne*, C. R. 85.

Devise to a
man or the
heirs of
his body.

A devise to a man or the heirs of his body, is an estate tail. *Parkin v. Knight*, 15 Sim. 83; *Wright v. Wright*, 1 Ves. sen. 409; *Harris v. Davis*, 1 Coll. 416; *Greenway v. Greenway*, 2 D. F. & J. 128.

Construc-
tion of a
devise to a
man or his
heirs.

And a similar construction has sometimes been placed upon a devise to A. or his heirs, both before and since the Wills Act. See *Read v. Snell*, 2 Atk. 642, p. 645; *Lachlan v. Reynolds*, 9 Ha. 797; *Adshead v. Willetts*, 29 B. 358.

Such a devise would, however, probably now be held to be substitutional in wills since the Wills Act, as it is no longer necessary to change "or" into "and," in order to give the devisee the fee. See *Parsons v. Parsons*, 8 Eq. 260.

Construc-
tion of
devises to a
man and
his issue.

B. With regard to realty, "the word issue in a will *primâ facie* means the same thing as heirs of the body, and is to be construed as a word of limitation." Per Parke, B., in *Slater v. Dangerfield*, 15 M. & W. 263.

Thus a devise to A. and his issue, or to several and their issue, as tenants in common, would, it seems, give estates tail. *Martin v. Swannell*, 2 B. 249; *Beaver v. Nowell*, 25 B. 551; *Campbell v. Bouskell*, 27 B. 325.

And a devise to A. and his issue living at his death has been held to give an estate tail. *University of Oxford v. Clifton*, 1 Ed. 473.

And a devise to A. and his issue, and the heirs of such issue, with a gift over in default of issue, before the Wills

Act, has the same effect. *Franklin v. Lay*, 6 Mod. 258, 2 Bl. 59 n.

But a devise to A. and his issue as tenants in common, if more than one, the tenancy in common being applied to the issue only, or to A. and his issue to be divided among them as A. should appoint, where there are words to carry the fee, gives A. an estate for life, with remainder to his issue in fee. *Doe d. Gilman v. Elvey*, 4 East, 313; *Hockley v. Mawbey*, 1 Ves. jun. 142. In *Doe d. Davy v. Burnsall*, 6 T. R. 30, 1 B. & P. 215, the word issue was explained to mean children by the gift over, if such issue died without issue.

Effect of words of distribution applied to the issue only.

And a devise to several and their issue and their heirs as tenants in common, gives an estate tail, according to the rule in *Wild's Case* (post), if there are no issue at the date of the devise. *Underhill v. Roden*, 2 Ch. D. 494.

The rule in *Wild's Case* applies to a limitation to a man and his issue in fee as tenants in common.

IV. WORDS OCCASIONALLY USED AS WORDS OF LIMITATION.

A. The words son and child may be used as words of limitation, if the testator has clearly shown his intention so to use them. "If the word son be not used as a *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail." *Mellish v. Mellish*, 2 B. & C. 520. Thus, if the devise is to A., and if he dies not having a son over, A. takes an estate tail in a case before the Wills Act. *Bifield's Case*, cited 1 Vent. 231; *Mil-liner v. Robinson*, 1 Moore, 682, pl. 939.

Words son and child used as words of limitation.

The same is the case, if the devise be to A. for life, and then to his son if he has one, and in default of such issue over. *Robinson v. Robinson*, 1 Burr. 38, 2 Ves. sen. 225, 3 Atk. 736; *Mellish v. Mellish*, 2 B. & Cr. 520;

Doe d. Garrod v. Garrod, 2 B. & Ad. 87 ; *Bell v. Bell*, 15 Ir. Ch. 517 ; *Andrew v. Andrew*, 1 Ch. D. 410.

Eldest son.

B. The term "eldest son" is less susceptible of a collective meaning than son or child. *Doe d. Burrin v. Chorlton*, 1 Scott N. R. 290, 1 M. & Gr. 429. But it will receive this meaning if the intention is clear. *Lewis v. Puxley*, 16 M. & W. 733 ; *Cleary's Trust*, 16 Ir. Ch. 438.

As between an estate tail in the father or son the Court prefers the former.

And if the devise is to A. for life, then to his eldest son for life, and so on to the eldest son of the family, an estate tail in remainder will be given to A., and not to his eldest son, so as to take in the largest number of descendants. *Forsbrooke v. Forsbrooke*, L. R. 3 Ch. 93.

C. In the same way the word children may be a word of limitation.

Children used as a word of limitation.

1. Thus a devise to A. to hold to him and his children for ever, or to A. and his children for ever, or to A. and his children lawfully begotten for ever, gives A. an estate tail. *Davie v. Stevens*, Dougl. 321 ; *Broadhurst v. Morris*, 2 B. & Ad. 1 ; *Wood v. Baron*, 1 East, 259 ; *Roper v. Roper*, L. R. 3 C. P. 32 ; 36 L. J. C. P. 27, 37 ib. 7. See, too, *Doe d. Gigg v. Bradley*, 16 East, 399.

In such cases children would seem to be a word of limitation quite independently of the so-called rule in *Wild's Case*, 6 Rep. 17.

Devise to A. and his children in succession.

So a devise of all the testator's *property* to A. and his children in succession gives A. an estate tail. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613 ; see *Snowball v. Proctor*, 2 Y. & C. C. 478.

Rule in *Wild's Case*.

2. A simple devise to A. and his children, where A. has no children at the time of the devise, gives him an estate tail. *Wild's Case*, 6 Co. Rep. 17.

And for this purpose a child *en ventre* at the date of the will is considered as non-existent. *Roper v. Roper*, L. R. 3 C. P. 32.

Power to appoint the

The rule applies, though the testator may expressly

give the parent a power of appointing the property in question among his children. *Seale v. Barter*, 2 B. & P. 485; *Clifford v. Brooke*, I. R. 10 C. L. 179.

property to children is not inconsistent with an estate tail. Exceptions.

3. There may, however, be an intention shown that the parent was not to take an estate tail.

Thus, in *Buffar v. Bradford*, 2 Atk. 220, the testator showed that he contemplated the mother and children as taking joint interests at a period subsequent to his death. And in *Grieve v. Grieve*, 4 Eq. 180, where there was a devise of a house to the testator's nieces and their children, and if they have not any over, a direction that the furniture was to go with the house was held sufficient to show that an estate tail could not have been intended.

4. If there are any children living at the time of the devise, the term children is *prima facie* not a word of limitation. *Byng v. Byng*, 10 H. L. 171; *Oates v. Jackson*, 2 Str. 1172; *Jeffery v. Honeywood*, 4 Mad. 398.

If there are children living at the date of the devise children is *prima facie* not a word of limitation. Contrary intention.

But this rule bends to evidence of a contrary intention; thus, a direction that certain things are to go as heirlooms with the estate, is sufficient to rebut a joint tenancy, and to show that an estate tail was intended to be given. *Byng v. Byng*, 10 H. L. 171.

The rule in *Wild's Case* does not apply to personalty. *Audsley v. Horn*, 26 B. 195, 1 D. F. & J. 226.

The rule in *Wild's Case* does not apply to personalty.

V. THE RULE IN SHELLEY'S CASE.

The construction of devises to heirs, and heirs of the body, after a prior estate of freehold in the ancestor, is governed by the so-called rule in *Shelley's Case*.

It may be laid down generally, that where the ancestor by any will takes an estate of freehold, whether by implication or direct limitation, and whether it may or may not determine in his lifetime, and in the same will an estate is limited by way of remainder, either mediately or imme-

The rule in *Shelley's Case* stated.

diately, to his heirs in fee or in tail, that always in such case the heirs are words of limitation of the estate and not words of purchase, and therefore the ancestor takes an estate in fee or in tail as the case may be. *Shelley's Case*, 1 Co. 93 b., Fearne, C. R. 33, 40; *Pybus v. Mitford*, 1 Ventr. 372; *Curtis v. Price*, 12 Ves. 99.

The two limitations must be in the same instrument, but the Court considers a will and codicils for this purpose as one instrument. *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698.

The rule applies equally to limitations of freehold and copyhold estates, and to estates *pur autre vie*. *Doe d. Jeff v. Robinson*, 8 B. & Cr. 296, 2 Ma. & R. 249; see 2 D. & War. 327; *Crozier v. Crozier*, 3 D. & War. 373.

It applies to limitations, which are both legal or both equitable: *Spence v. Spence*, 12 C. B. N. S. 199; even where the first is for the separate use of a married woman. Fearne, C. R. 56; *Pitt v. Jackson*, 2 B. C. C. 51.

It does not apply to cases where one limitation is legal and the other equitable. *Right v. Creber*, 5 B. & C. 866; *Collier v. McBean*, 34 L. J. Ch. 555.

The rule does not apply so as to destroy intermediate contingent limitations by merger, even in cases before 8 & 9 Vict. c. 106. *Lewis Bowles' Case*, 11 Rep. 80; Fearne, C. R. 36.

Nor does it apply where the estate to the heir is limited, not by way of remainder simply, but as a conditional limitation or as an alternative contingent remainder. *Lloyd v. Carew*, Prec. Ch. 72, Show P. C. 137; see Fearne, 275; *Plunket v. Holmes*, 1 Lev. 11, Raym. 28, Fearne, 341; *Crofts v. Middleton*, 2 K. & J. 194, 8 D. M. & G. 192.

Application
of the rule
where the

The rules of construction with reference to cases coming within the operation of the rule in *Shelley's Case* are

settled by the leading cases of *Jesson v. Wright*, 2 Bl. 1, and *Roddy v. Fitzgerald*, 6 H. L. 823.

A. Where the words heirs or heirs of the body are used in the limitation of the inheritance the rule applies :

1. Although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that his estate is to be for life only.

Thus, it is immaterial, that the estate of the ancestor may be declared to be "for life and no longer : " *Roe d. Thong v. Bedford*, 4 Mau. & S. 362, 1 B. C. C. 813 ; *Robinson v. Robinson*, 1 Burr. 38, 3 B. P. C. 180, 2 Ves. sen. 225 ; that he is made unimpeachable for waste : *Jones v. Morgan*, 1 B. C. C. 206 ; *Bennett v. Earl of Tankerville*, 19 Ves. 170 ; that powers are expressly given him which would be implied if he were tenant in tail, such as powers to jointure and make leases : *Baile v. Coleman*, 2 Vern. 668 ; *Jones v. Morgan*, 1 B. C. C. 206 ; *Broughton v. Langley*, 2 Ld. Ray. 873 ; that his estate is made subject to the obligation of keeping the buildings in repair : *Jesson v. Wright*, 2 Bligh, 1 ; that there is a restraint upon alienation for longer than his life : *Perrin v. Blake*, 1 W. Bl. 672 ; *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698 ; and that, where there is no executory trust, there is a declaration that special care should be taken that it should never be in the power of the ancestor to dock the entail : *Leonards v. Earl of Sussex*, 2 Vern. 526 ; and that there is a limitation to trustees to preserve contingent remainders. *Wright v. Pearson*, Amb. 358, 1 Ed. 119.

2. The rule applies, where words of limitation are superadded to the limitation to the heirs or heirs of the body, provided such words are not inconsistent with the nature of the descent pointed out by the first words, for such words may be looked upon as an explanation of what the testator supposed to be the course of the descent

limitation is to the heirs or the heirs of the body of the ancestor.

Restrictions upon the estate of the ancestor are immaterial.

Words of limitation superadded to the word heirs will not make it a word of purchase.

under an estate tail, and *expressio eorum quæ tacite insunt nihil operatur*.

Thus words limiting the estate of the heirs to a life estate : *Doe d. Elton v. Stenlake*, 12 East, 515 ; *Hugo v. Williams*, 14 Eq. 224 ; or to a life estate without power to sell or dispose, will be rejected. *Hayes v. Foorde*, 2 W. Bl. 698.

The same will be the case with words of limitation in fee or in tail, superadded to the word heirs or heirs of the body.

Thus a limitation to the heirs of the body of the ancestor and their heirs, or their heirs, executors, administrators, and assigns for ever : *Morris d. Andrews v. Le Gay*, cited 2 Burr. 1108, and 8 T. R. 518 ; *Kinch v. Ward*, 2 S. & St. 409 ; *Measure v. Gee*, 5 B. & Ald. 910 ; *Nash v. Coates*, 3 B. & Ad. 839 ; or to the heirs male of the body of the ancestor, and their issue : *Minshull v. Minshull*, 1 Atk. 411 ; or to the heirs male of his body in tail, in strict settlement : *Douglas v. Congreve*, 1 B. 59 ; or to the heirs male of his body, and the heirs male of the body of every such *heir* male severally and successively as they should be in priority of birth, every elder, and the heirs male of his body, to be preferred to every younger : *Legatt v. Sewell*, 1 Eq. Abr. 395, p. 7, 1 P. Wms. 37 ; see *Fearne*, 159, 160 ; see *Fetherston v. Fetherston*, 3 Cl. & F. 67, 9 Bl. 237 ; will not avail to give the heirs an estate by purchase.

Words of
distribu-
tion super-
added.

3. Words of distribution following the limitation of the inheritance will not prevent the application of the rule, " for it does not follow that the testator did not intend that heirs of the body should take because they could not take in the mode prescribed."

Thus a declaration that the heirs are to take as tenants in common, and not as joint tenants ; *Doe d. Candler v. Smith*, 7 T. R. 531 ; *Bennett v. Earl of Tankerville*, 19

Ves. 170 ; or equally among them, share and share alike : *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944 ; or in such shares and proportions as the ancestor should appoint : *Jesson v. Wright*, 2 Bl. 1 ; see *Roddy v. Fitzgerald*, 6 H. L. 823 ; *Dunk v. Fenner*, 2 R. & M. 557 ; or “as well male as female,” or “whether sons or daughters” as tenants in common : *Doe d. Bosnall v. Harvey*, 4 B. & C. 610 ; *Pierson v. Vickers*, 5 East, 548, will not prevent the operation of the rule.

In such a case it makes no difference that the lands are gavelkind. *Doe d. Bosnall v. Harvey*, *supra*, overruling *Doe v. Laming*, 2 Burr. 1100. Gavelkind lands.

The absence of a gift over in default of issue is immaterial. *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944.

4. Nor will words of distribution and limitation together, superadded to the limitation of the inheritance, prevent the operation of the rule. Words of distribution and limitation super-added.

It has sometimes been laid down that words of distribution and limitation together, superadded to the heirs, would make the latter a word of purchase, but the rule is now clearly settled, overruling *Gretton v. Haward*, 6 Taunt. 94, 2 Marsh. 9, and *Crump d. Woolley v. Norwood*, 7 Taunt. 362, 2 Marsh. 161 ; see *Anderson v. Anderson*, 30 Beav. 209 ; *Mills v. Seward*, 1 J. & H. 733 ; *Grimson v. Downing*, 4 Dr. 125 ; and see *Jordon v. Adams*, 9 C. B. N. S. 483.

Lord Chief Justice Cockburn, in the last cited case, p. 497, thus sums up the law with reference to the extent of the application of the rule in *Shelley's case*, where the words, heirs or heirs of the body are used : “No incident, superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of in-

heritance, nor any declaration, however express or emphatic, of the devisor, can be allowed, either by inference or by force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs or the heirs of his body, the law inexorably converts the entire devise in favour of the ancestor."

The words heirs or heirs of the body will, however, be construed as words of purchase :

Words of limitation superadded inconsistent with the course of descent of an estate tail in the ancestor.

1. When words of limitation are superadded to them inconsistent with the nature of the descent pointed out by the first words, as where the limitation is to a man for life, and after his decease to the use of his heirs and the heirs female of their bodies. Fearne, C. R. 182 ; *Shelley's Case*, 1 Rep. fol. 88, 95 b.

There appears to be no other authority for this rule than the argument of counsel in *Shelley's Case*, cited with approbation by Fearne, C. R., p. 182. It has, however, been followed in a case where the word issue and not heir was used. See *Hamilton v. West*, 10 Ir. Eq. 75. In that case the devise was to Margaret for life remainder to her issue female and the heirs of their bodies ; and it was held that Margaret took only a life estate, with remainder to her daughters in tail general, and there seems no reason for supposing, that the same principle would not be applied, where the word heirs instead of issue is used. See *Dodds v. Dodds*, 10 Ir. Ch. 476 ; 11 ib. 374.

What is an inconsistent course of descent.

In the absence of authority it is doubtful, what amount of discrepancy between the two courses of descent, will justify the application of this rule. Fearne, C. R. p. 183, points out that "there does not appear to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the super-added words extend to heirs general, as there is where

the first words, and those engrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same person ; in the latter case it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation ; whereas, in the former case, the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them ; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding ; and then both may be satisfied, by taking the first as words of limitation." In *Hamilton v. West*, however, the question was between an estate in tail female in the ancestor and an estate in tail general to the daughters, the latter of which would, "in their general sense," have included the former ; and it seems, therefore, that Fearne's remark must be taken with some modification.

2. Where the testator has, either by express words, or by implication, interpreted the meaning he intended to convey by the term heirs or heirs of the body, those words may be words of purchase.

The testator may interpret the sense in which he has used the word heirs.

In *Fetherston v. Fetherston*, 3 Cl. & F. 67, Lord Brougham lays down, "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the word heirs of the body to denote A.'s first or other sons, then clearly the first taker would only take a life estate."

However, the mere insertion of such words as, if more than one child, or, if only one child, then to such child, is not sufficient to show that the testator meant by heirs of the body, children. *Roddy v. Fitzgerald*, 6 H. L. 823 ; *Jesson v. Wright*, 2 Bl. 1.

Effect of the words "if more than one child, to such child."

Effect of
the words
“if more
than one
such
child,” &c.

And even if the words are, if there be but one *such* child, to such child, his or her heirs for ever, the term heirs of the body will not be held to mean children, if there are no words to carry the fee to them, except in the event of there being only one child. *Bridge v. Chapman*, Notes of Cases, L. J., July 10, 1875, 118; see *Ryan v. Cowley*, Ll. & G. temp. Sug. 7.

But in similar cases heirs of the body will be construed as children, if there are words giving them an estate in fee or in tail. *Goodtitle d. Sweet v. Herring*, 1 East, 264; *Gummoe v. Howes*, 23 B. 184. In *Poole v. Poole*, 3 B. & P. 620, this construction was rebutted by other limitations.

Express in-
terpreta-
tion clause.

So if the testator, after using the words heirs of the body, continues, “that is to say, the first, second, and other sons, etc.” *Lowe v. Davies*, 2 Ld. Raym. 1561.

Interpre-
tation by
reference.

Or again, the testator may explain his meaning by reference to other limitations. *Meredith v. Meredith*, 10 East, 503; *Doe d. Woodall v. Woodall*, 3 C. B. 349; *East v. Twyford*, 4 H. L. 517.

Heirs of
the body
coupled
with a
reference
to the an-
cestor as
their father
mean
children.

And the word heirs of the body, coupled with a reference to the ancestor, as their father, must mean children. *Jordan v. Adams*, 9 C. B. N. S. 483.

First heirs
male.

B. The application of the rule in *Shelley's Case* is the same, where the words are first heirs male or heirs of the body who shall attain twenty-one. *Minshull v. Minshull*, 1 Atk. 411; *Toller v. Attwood*, 15 Q. B. 929.

Limitation
to the heir
of the
tenant for
life.

C. When the word heir is used in the singular, the rules of law are less stringent in uniting the limitation of the inheritance to the estate for life of the ancestor.

1. However, the word heir, in the singular, without words of limitation superadded, is a word of limitation and not of purchase, even when such words as “next” or “first” are added to it. *Blackburn v. Stables*, 2 V. & B. 367; *Burley's case*, cit. 1 Vent. 230; *Whiting v. Wilkins*,

1 Bulst. 219; *Richards v. Lady Bergavenny*, 2 Vern. 324; *White v. Collins*, Com. Rep. 289; *Dubber d. Trollope v. Trollope*, Ambl. 453.

The fact that the limitation is to the heir for ever makes no difference. *Fuller v. Chamier*, L. R. 2 Eq. 682.

2. But words of limitation in fee or in tail, superadded to the word heir, make it a word of purchase. *Archer's case*, 1 Co. 66; *Fearne*, C. R. 150; *Clerke v. Day*, Moore, 593; *Willis v. Hiscox*, 4 M. & Cr. 197; *Greaves v. Simpson*, 12 W. R. 773; 10 Jur. N. S. 609.

Words of limitation superadded to the word heir.

And even a devise to A. to hold to him and the heir male of his body, and the heirs and assigns of such heir male for ever, followed by a gift over, if A. died without leaving any son of his body, has been held to give A. a life estate only. *Chamberlayne v. Chamberlayne*, 6 E. & B. 625.

3. Where the estate of the heir is expressed to be for life, in as much as he is not to have the inheritance, he cannot take as heir by descent. *White v. Collins*, Com. 289.

D. The application of the rule in *Shelley's case*, where the limitation is to the issue of the ancestor, who takes a prior estate of freehold:

The rule in *Shelley's Case* applies where the limitation is to the issue of a tenant for life. Distinction between the word issue and heirs.

“The authorities clearly show that, whatever be the *primâ facie* meaning of the word issue, it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression heirs of the body would do.” Per Alderson, B., *Lees v. Mosley*, 1 Y. & C. Ex. 609.

This doctrine was questioned by Lord Wensleydale in *Roddy v. Fitzgerald*, 6 H. L. 882:—“I certainly feel a difficulty in figuring to myself, what precise sort of context would be sufficient to alter the sense of the word issue, which would not have the same effect,

if the words used were the admitted technical words, heirs of the body." There can, however, be no doubt that words of modification will more readily convert the word issue than the word heirs into a word of purchase, and the remark of Lord Wensleydale must be held to apply to cases where other words have interpreted the word issue to mean children. Thus :

Words of
distribu-
tion alone
superadded
in cases
before the
Wills Act.

1. Words of distribution alone, superadded to the word issue, in cases where the issue would not take the inheritance, will not make it a word of purchase. *Doe d. Blandford v. Applin*, 4 T. R. 82; *Doe d. Cock v. Cooper*, 1 East, 229; *Roddy v. Fitzgerald*, 6 H. L. 823; *Colclough v. Colclough*, 1 R. 4 Eq. 263; *Woodhouse v. Herrick*, 1 K. & J. 352.

This is clear, when there is a gift over upon an indefinite failure of issue; but it seems, that a gift over is immaterial, since, under the old law, the issue, if they took as purchasers, could only take for life, and, therefore, the testator's general intent to benefit all the issue would fail. See per Wood, V.-C., in *Kavanagh v. Morland*, Kay, 16, 27, where the same construction prevailed, although the gift over was in default of issue of the tenant for life living at his death; and this is in accordance with *Doe v. Rucastle*, 8 C. B. 876.

Words of
limitation
super-
added.

2. Words of limitation in fee or in tail, superadded to the word issue, where there is a limitation in default of issue in cases before the Wills Act, will not make it a word of purchase, provided they do not change the course of descent. *Roe d. Dodson v. Grew*, 2 Wils. 324, Wilm. 272; *Denn d. Webb v. Puckey*, 5 T. R. 299; *Frank v. Stovin*, 3 East, 548; *Griffiths v. Evan*, 5 B. 241.

The same rule applies, where the gift over is on failure of issue living at the death of the person, to whom the prior estate is limited, or on death of the issue under twenty-one. *Warren v. Travers*, 1 R. 2 Eq. 455; see

Fetherston v. Fetherston, 3 Cl. & F. 67, 9 Bl. 237. *Merest v. James*, 1 B. & B. 484, 4 J. B. Moo. 327, must be considered overruled.

Whether the absence of a gift over in default of issue will convert it into a word of purchase seems doubtful. In *Doe d. Cooper v. Collis*, 4 T. R. 294, a devise to S. for life, and after her decease to the issue of her body and their heirs for ever, without any limitation in default of issue, was held to give S. an estate for life only; but the judgment was not based upon the absence of a limitation over in default of issue, and the authority of the case seems questionable. On the whole it seems, that when the fee is already in the issue, the gift over can have no influence either way, the dying without issue being held to refer to such issue as were before mentioned. See the remarks of Wood, V.-C., Kay, 16, 27; and see *Montgomery v. Montgomery*, 3 J. & Lat. 47.

Effect of the absence of a gift over in default of issue.

3. If, however, the superadded words of limitation alter the course of descent, the issue will take as purchasers. *Hamilton v. West*, 10 Ir. Eq. 75; *Dodds v. Dodds*, 10 Ir. Ch. 476, 11 ib. 374, *ante*, p. 222.

4. Words of limitation in fee or in tail, and of distribution, superadded to the word issue, make it a word of purchase, whether there is a limitation over in default of issue or not. *Lees v. Mosley*, 1 Y. & C. Ex. 589; *Crozier v. Crozier*, 3 D. & War. 373; *Greenwood v. Rothwell*, 5 M. & Gr. 628; 6 Sc. N. R. 670; *Montgomery v. Montgomery*, 3 J. & Lat. 47; *Slater v. Dangerfield*, 15 M. & W. 263; *Colclough v. Colclough*, 1. R. 4 Eq. 263; *M'Kenna v. Eager*, 1. R. 9 C. L. 79.

Words of limitation and distribution superadded make issue a word of purchase.

It makes no difference, whether a fee be given to the issue by express words or by implication. *Bradley v. Cartwright*, L. R. 2 C. P. 511.

5. It may be noticed that, in wills coming under the operation of the Wills Act, a devise to A. for life, and

Words of distribution super-

added in
cases since
the Wills
Act.

after his death to his issue as tenants in common, will fall under the last head, since under such words the issue would take a fee.

Effect of a
restraint
upon
alienation
by the
tenant for
life and his
issue or any
of them.

6. In *King v. Burchell*, Amb. 379, 4 T. R. 296 *n.* a direction against alienation by the tenant for life and his issue, or any of them, was held to show that the word issue was used as a word of limitation. See, too, *Tate v. Clark*, 1 B. 100.

CHAPTER XX.

ESTATES OF TRUSTEES.

I. IN WHAT CASES TRUSTEES TAKE THE LEGAL ESTATE.

A DEVISE to the use of A., in trust for B., gives A. the legal estate by analogy to the Statute of Uses; while, similarly, a devise to A., in trust for B., gives B. the legal estate.

Effect of the Statute of Uses on devises to trustees.

In the latter case it makes no difference that the devise to the trustees is subject to payment of debts, if the duty of paying them is not imposed on the trustees. *Kenrick v. Lord Beauclerk*, 3 B. & P. 178; *Jones v. Lord Say*, 8 Vin. 262, pl. 19.

But the trustees will take the legal estate if it is necessary for the performance of the trust imposed upon them.

Thus, a devise to trustees and their heirs in trust to pay the rents to B. gives the trustees the legal estate. *Doe v. Homfray*, 6 A. & E. 206.

Devise in trust to pay rents.

But a devise to trustees to permit B. to receive the rents vests the legal estate in B. *Right d. Phillips v. Smith*, 12 East, 455; *Doe d. Noble v. Bolton*, 11 Ad. & E. 188.

Devise in trust to permit *cestui que* trust to receive rents.

And, similarly if the trust is to pay to or permit B. to receive the rents, the latter direction takes effect and the legal estate vests in B. *Doe v. Biggs*, 2 Taunt. 109; *Baker v. White*, 20 Eq. 166.

Devise in trust to pay to or permit

cestui que
trust to
receive
rents.

But if the beneficiaries are to receive only the net profits, the trustees take the legal estate. *Barker v. Greenwood*, 4 M. & W. 421.

Net rents.
Separate
use.

So, too, if the trust is to permit a married woman to receive the rents to her separate use, the legal estate remains in the trustees. *Harton v. Harton*, 7 T. R. 652.

Trustees to
preserve
contingent
remainders.

So, too, if the trustees are to preserve contingent remainders during the life of the tenant for life, a trust to permit the latter to receive the rents will not give him the legal estate. *Biscoe v. Perkins*, 1 V. & B. 485.

Effect of
a power to
give re-
ceipts on
the legal
estate.

And it would seem, that a power to the trustees to give receipts, would show that they were to receive the rents and pay them over to the beneficiaries, notwithstanding the trust is to permit the beneficiaries to receive them. But a receipt clause will not have this effect if copyholds are given with the freeholds, since it may be limited to the former, to which the Statute of Uses does not apply. *Baker v. White*, 20 Eq. 166.

And if the receipts of the beneficiary are to be with the approbation of the trustees, they take the legal estate. *Gregory v. Henderson*, 4 Taunt. 772.

Trust to
pay debts
and lega-
cies

A devise to trustees upon trust to pay debts and legacies, vests the legal estate in them at once, whether the personalty is sufficient for that purpose or not. *Murthwaite v. Jenkinson*, 2 B. & C. 357, 3 D. & Ry. 765.

Trust to
arise only
if the per-
sonalty is
insufficient.

On the other hand, if the trust is to pay the debts out of the realty only if the personalty proves deficient, the trustees take the legal estate, only if the event happens. *Carlyon v. Truscott*, 20 Eq. 339. See *Doe d. Cadogan v. Ewart*, 7 A. & E. 636.

Leaseholds
for years
and copy-
holds are
not within
the Statute
of Uses.

The Statute of Uses does not apply to leaseholds for years or to copyholds, and therefore a devise of copyholds to A., in trust for B., gives A. a legal estate. *Houston v. Hughes*, 6 B. & C. 403; *Baker v. White*, *supra*.

An appointment, under a power to appoint the use, vests the legal estate in the appointee. 2 Jarman, 284.

II. THE QUANTITY OF THE ESTATE OF TRUSTEES.

As regards the quantity of the estate taken by the trustee, the same rules apply to copyholds, leaseholds, and freeholds. *Doe v. Barthrop*, 5 Taunt. 382; *Baker v. White*, 20 Eq. 166; *Stephenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

1. A devise to trustees and their heirs, with a general power to sell or convey, will give them the fee though some of the limitations might, in the absence of such a power, be legal. *Rackham v. Siddall*, 1 Mac. & G. 607; *Doe d. Shelley v. Edlin*, 4 A. & E. 582; *Bagshaw v. Spencer*, 1 Ves. sen., 142, 2 Atk. 570; *Watson v. Pearson*, 2 Ex. 581; *Blagrove v. Blagrove*, 4 Ex. 550; *Cropton v. Davies*, L. R. 4 C. P. 159.

Devise in fee with power to sell or convey.

But in the case of copyholds, a direction that they are to be transferred does not require the legal estate. *Doe d. Player v. Nicholls*, 1 B. & C. 336.

Direction to transfer copyholds.

And if the power of sale does not arise till after a life estate, the ordinary rule applies to ascertain whether the life estate is equitable or legal. *Doe d. Noble v. Bolton*, 11 A. & E. 188.

And even, where the devise before the Wills Act would not have carried the fee, a trust to sell will give trustees the fee. *Doe d. Cadogan v. Ewart*, 7 Ad. & E. 636.

Devise without words of limitation enlarged to a fee by power of sale.

2. But though there may be words which will give the trustees a fee, their estate may be controlled if it can be shown what less estate will satisfy the trust.

Thus, a devise to trustees and their heirs till an infant attains twenty-one, and then to the infant in fee, gives the trustees only a chattel interest. *Goodtitle v. Whitby*, 1 Burr. 228.

Devise in fee till an infant attains twenty-one.

So, a devise in fee to trustees to preserve contingent

Devise in

fee to pre-
serve
contingent
remain-
ders.

remainders will be cut down to an estate for the life of the tenant for life, if there are no subsequent remainders to preserve. *Doe d. Compere v. Hicks*, 7 T. R. 433; *Haddelsey v. Adams*, 22 B. 266; *Saunders v. Eppe*, 9 W. R. 69.

If, however, there is a power of appointment under which contingent remainders may be created, the estate of the trustees will not be cut down. *Venables v. Morris*, 7 T. R. 342, 437.

This, however, only applies to trustees, especially inserted to preserve contingent remainders. *Doe v. Barthrop*, 5 Taunt. 382.

Devise in
fee to pay
rents to A.
for life
with legal
remainder
over.

So a devise to trustees in fee, on trust to pay rents to A. for life, with remainder to B., gives them an estate for A.'s life only. *Playford v. Hoare*, 3 Y. & J. 175.

A fortiori, if the devise in remainder is an independent devise. *Adams v. Adams*, 6 Q. B. 860; *Cooke v. Blake*, 1 Ex. 220.

Effect of
leasing
powers
where the
devise is in
fee.

3. But where the devise is to trustees in fee, and they must at least take an estate for life, an indefinite power of leasing will show that they were to have the fee. *Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84; *Doe d. Keen v. Walbank*, 2 B. & Ad. 554; *Riley v. Garnett*, 3 De G. & S. 629; *Collier v. Walters*, 17 Eq. 252; see 1 Ch. 81.

This does not apply where the power to lease is limited to the continuance of the trust. *Doe d. Kimber v. Cafe*, 7 Ex. 675.

As to what is a general power of leasing, see *Vivian v. Jegon*, L. R. 3 H. L. 285.

Effect
where there
are re-
mainders
to the sepa-
rate uses of
a married
woman.

And if the first life estate is in trust for a married woman for her separate use, as well as some of the remainders, the intermediate estates will not be legal estates; but the legal estate will be in the trustees, at any rate as long as there are any remainders to the separate

use of married women left. *Harton v. Harton*, 7 T. R. 652; *Brown v. Whiteway*, 8 Ha. 145; *Toller v. Atwood*, 15 Q. B. 929.

When there is a devise to trustees in fee, followed by a direction to them to pay debts, or even, when the trustees are also executors, by a mere general direction to pay debts, the fee will not be cut down to a smaller interest, such as an estate *pur autre vie*. *Spence v. Spence*, 10 W. R. 605; *Creton v. Creton*, 3 Sm. & G. 386; *Smith v. Smith*, 11 C. B. N. S. 121.

Devise in fee with a direction to pay debts.

But this is not the case with a mere charge of debts. *Kenrick v. Lord Beauclerk*, 3 B. & P. 178.

And a general direction to pay debts will not enlarge a devise to trustees without words of limitation to a fee. *Doe v. Claridge*, 6. C. B. 641.

Mere general direction to pay debts.

4. In cases before the Wills Act a devise to trustees in words, that did not carry the fee, upon trust to pay debts, or make certain specified payments out of the rents, only gave them a chattel interest till the payments were made. *Cordall's Case*, Cro. El. 316; *Doe v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 A. & E. 879; *Heardson v. Williamson*, 1 Kee. 33.

Devise to trustees without words of limitation upon trust to pay debts before the Wills Act.

So where the trustees were to pay annuities, and then a specified sum out of the rents and profits, they took an estate for the lives of the annuitants with a chattel interest superadded. *Doe d. White v. Simpson*, 5 East, 162.

The law, however, on this point has been altered by the 30th and 31st sections of the Wills Act, which provide:—

Sections 30 & 31 of the Wills Act.

Section 30. “That when any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold,

shall thereby be given to him expressly or by implication."

Section 31. "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Effect of these sections according to Mr. Jarman.

The short effect of these obscure sections as stated by Jarman, and adopted by most of the writers who have followed him, is, "that trustees whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee." 2 Jarm. 296; see Shelford, Real Property Stat. 532, Lewin on Trusts, 195.

III. IN WHAT CASES EXECUTORS HAVE A POWER OF SALE.

Distinction between estate and power.

It is important in some cases to distinguish between an estate vested in trustees, and a mere power given to them. Thus a devise to executors to sell passes the interest, but a devise that executors shall sell the land, or that land shall be sold by them, gives them but a power. *Howell v. Barnes*, Cro. Car. 382; *Yates v. Compton*, 2 P. W. 808; *Lancaster v. Thornton*, 2 Burr. 1027; *Doe v. Shotter*, 8 A. & E. 905; see *Knocker v. Bunbury*, 6 Bing. N. C. 306; *Lambert v. Browne*, 1 R. 5 C. L. 218.

Direction that land

When land is directed to be sold, but no persons

are appointed to carry the direction into effect, the executor will take an implied power of sale, if the object of the sale falls within the proper duties of an executor.

is to be sold without saying by whom.

Thus, the executors will have a power of sale, if the object of the sale is to pay debts and legacies. *Inchley v. Robinson*, 2 Leon. 145; *Blatch v. Wilder*, 1 Atk. 420; *Forbes v. Peacock*, 11 M. & W. 630; see *Hooper v. Strutton*, 12 W. R. 367.

Where the object of the sale is to pay debts and legacies,

The same is the case, if the proceeds of the sale are united with the personalty to form a mixed fund for the purpose of division. *Tylden v. Hyde*, 2 S. & St. 238.

or to create a mixed fund.

On the other hand, where land is devised, and there is a direction, that it is to be sold in certain events, the executors take no power of sale. *Patton v. Randall*, 1 J. & W. 189.

Direction that land is to be sold and the proceeds divided will not give the executors a power of sale.

Nor will a direction to sell and divide the proceeds among certain persons give them a power of sale. *Bentham v. Wiltshire*, 4 Mad. 44; *Allum v. Fryer*, 3 Q. B. 442; see *Haydon v. Wood*, 8 Ha. 279 n.

As to the distinction between powers of management and powers of disposition, see *Broom v. Sheffield Bank*, 24 W. R. 948.

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, secs. 14 and 16, which apply to wills coming into operation after the 18th August, 1859, devisees in trust of the testator's whole interest in real estate charged with debts or legacies, no provision being made for the raising such debts or legacies, may raise the same by sale or mortgage, and where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executors have a similar power of raising the amount.

Lord St. Leonards' Act, secs. 14, 16, and 18.

Section 18 declares that the said sections of the Act shall not extend to a (beneficial) devise to any person or persons in fee or in tail, or for the testator's whole estate

and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do.

The rules with regard to wills not within Lord St. Leonards' Act.

Devise to trustees of land subject to a general charge of debts.

In cases where this Act does not apply the law is not in a very satisfactory state.

1. Where debts and legacies are charged on land, and the land is devised to trustees upon trusts not including the payment of debts, the trustees and not the executors are apparently the persons to sell and receive the purchase money. *Shaw v. Borrer*, 1 Kee. 559; *Ball v. Harris*, 4 M. & Cr. 264; *Stroughill v. Anstey*, 1 D. M. & G. 647; *Sabin v. Heape*, 27 B. 553; *Hodkinson v. Quinn*, 1 J. & H. 303.

In such a case the fact that the trustees take only an estate *pur autre vie*, the use in remainder being executed by the effect of the Statute of Uses, will not affect their power to sell in order to raise the charge. *Eidsforth v. Armstead*, 2 K. & J. 333.

Beneficial devise subject to debts to a person who is also executor.

2. When there is a charge of debts and legacies on land and the land is devised beneficially, expressly subject to the charge, to a person who is one of several executors, he can sell and pass the legal estate. *Colyer v. Finch*, 5 H. L. 905; *Corsser v. Cartwright*, 8 Ch. 971, L. R. 7 H. L. 731.

Similar devise to a person not executor.

3. And the case would apparently be the same where the devisee who takes subject to the express charge, is not an executor. See *Corsser v. Cartwright*, 8 Ch. 971, 975.

Whether a general charge of debts on land gives the executor a power of sale.

4. When there is a charge of debts and legacies on land, and the land is beneficially devised or not devised at all, so that there is a difficulty how the charge is to be enforced, it would seem that *prima facie* the executor has no power to sell the land. This is the result both of the general principle of the cases and of the only authority where the exact point arose for decision. *Doe*

v. *Hughes*, 6 Ex. 223 : see *Gosling v. Carter*, 1 Coll. 644.

On the other hand an intention may be collected from the will, that the executor, and not the devisee, was intended to enforce the charge, in which case the power of sale would include the power of passing the legal estate as well.

Thus, if the land is devised for life with contingent remainders over, it is clear that the devisees cannot make a good title ; yet on the other hand the charge must be raised at once, and therefore a power of sale is implied in the executor. *Robinson v. Lowater*, 5 D. M. & G. 275.

The above seems to be the effect of the actual decisions on this vexed point. Lord Romilly, however, in numerous cases, has given his opinion that a charge of debts on land, where the land is beneficially devised, gives the executors an implied power of sale.

It may be doubted, however, whether the cases expressed to be decided by him on this ground may not be supported upon other principles ; see the cases already cited. *Wrigley v. Sykes*, 21 B. 337, might, perhaps, be upheld on the ground that an express trust to pay debts and legacies was imposed upon the executors who were also devisees subject to a term.

It must, however, be admitted that the case is a strong authority for the proposition that a mere charge of debts gives the executors a power of sale over realty ; see, too, *Bolton v. Stannard*, 4 Jur. N. S. 576. But in all probability a court even of co-ordinate jurisdiction would find no difficulty in declining to follow *Wrigley v. Sykes* on the authority of *Doe v. Hughes*, unless it were possible to confine the decision in the latter case to the mere question of the legal estate, which, however, would be contrary to the express terms of the judgments delivered.

For the opinions of the profession on this subject, see Sudg. V. & P. 18th ed. 545; Pow. 121-2; Williams on Real Assets, ch. vi. p. 77; Davidson's Conv. Vol. II. 989 *n.*; Dart. V. & P. 619, *seq.*; Lewin on Trusts, 402, *seq.*; Hayes & Jarman's Conc. Prec. 564; and see Farwell on Powers, 57.

CHAPTER XXI.

ABSOLUTE INTERESTS IN PERSONALTY.

I. BEQUESTS OF PERSONALTY WITH WORDS OF LIMITATION.

1. It is clear that a bequest to A. and his executors, or to A. and his representatives, gives A. the absolute interest, the additional words being merely words of limitation. *Lugar v. Harman*, 1 Cox, 250; *Taylor v. Beverley*, 1 Coll. 108; *Appleton v. Rowley*, 8 Eq. 139.

Bequest to A. and his executors or representatives.

So, too, a gift to A. for life, and then to his executors or administrators, or to his personal representatives, gives A. the absolute interest. *A.-G. v. Malkin*, 2 Ph. 64; *Saberton v. Skeels*, 1 R. & My. 587; *Alger v. Parrot*, L. R. 3 Eq. 328; *Avern v. Lloyd*, 5 Eq. 383; *Wing v. Wing*, 24 W. R. 878.

Bequest to A. for life and then to his executors.

It is of course immaterial, that the life interest is determinable. *Webb v. Sadler*, 14 Eq. 583, 8 Ch. 419.

If, however, the gift is to A. for life, and then to his executors or administrators for their own use and benefit, they will take beneficially. *Sanders v. Franks*, 2 Mad. 147; *Wallis v. Taylor*, 8 Sim. 241.

In what case the executors take beneficially.

But the intention that the executors are to take beneficially must be unmistakeably plain. *Stocks v. Dodsley*, 1 Keen, 325.

2. A bequest of personalty to a man and his heirs would no doubt pass the absolute interest.

Bequest to A. and his heirs.

So, too, a bequest to A. and the heirs of his body

Bequest to

A. and the heirs of his body.

Bequest to A. for life and if he dies without issue over before the Wills Act.

Bequest to A. for life and then to the heirs of his body followed by a gift over.

gives A. an absolute interest in personalty. *Seale v. Seale*, 1 P. W. 290.

And in wills before the Wills Act, if the gift is to A. for life, and if he die without issue over, A. takes an absolute interest, as he would take an estate tail in realty. *A.-G. v. Bayley*, 2 B. C. C. 553; *Chandless v. Price*, 3 Ves. 98. Here the gift over, being upon an indefinite failure of issue, is too remote, and the only way to carry out the testator's intention is to follow the rules applicable to realty, which would give A. an estate tail.

The same rule applies if the gift is to A. for life and then to the heirs of his body, and if he die without issue over. *Butterfield v. Butterfield*, 1 Ves. sen. 133; *Theebridge v. Kilburne*, 2 Ves. sen. 233; *Williams v. Lewis*, 3 Dr. 669, 6 H. L. 1013; see, too, *Elton v. Eason*, 19 Ves. 73; *Garth v. Baldwin*, 2 Ves. sen. 646; *Tothill v. Pitt*, 1 Mad. 488, 7 B. P. C. 453; *Brouncker v. Bagot*, 19 Ves. 574, 2 Mer. 271.

Of course if, in wills before the Wills Act, the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A. and the heirs of his body gives A. an interest defeasible upon failure of issue at his death. *Read v. Snell*, 2 Atk. 642; *Hodgeson v. Bussey*, 2 Atk. 89; *Paine v. Stratton*, 2 Atk. 647, 3 B. P. C. 257, *Fearne*, C. R. 494.

In all these cases the testator has shown a clear meaning, that the property should go in a course of devolution, till there is an exhaustion of heirs of the body; and, as this intention cannot be carried into effect, the court gives an absolute interest in personalty. See *Ex parte Wynch*, 5 D. M. & G. 188.

In what cases heirs of the body will be a word of limitation in

But if such an intention is not manifested, it seems that the courts will be unwilling to apply the rules of tenure to personal estate, and it must be collected from the general language of the will, whether the words heirs and

heirs of the body are intended to be words of limitation or purchase.

bequests
since the
Wills Act.

Thus, if the bequest is to A. for life, and after her decease to her heirs as she shall give it by will, and if she die without a will to her right heirs for ever, the term right heirs is equivalent to executors and administrators. *Powell v. Boggis*, 35 B. 535.

So if the intention is to create a succession of estates, as in a gift to A. for life and after his decease to the heirs male of his body, and so in succession, A. takes an absolute interest. *Britton v. Twining*, 3 Mer. 176; see *Cleary's Trust*, 16 Ir. Ch. 438.

But if there is anything to show that the heirs were to take by purchase; if, for instance, they are to take as tenants in common, the life estate will not be enlarged, whether there is a gift over in default of issue or not. *Bull v. Comberbach*, 25 B. 540; *Jacobs v. Amyott*, 4 B. C. C. 542; *Jeaffreson's Trust*, L. R. 2 Eq. 276.

Words of
distribu-
tion super-
added
make the
word heirs
a word of
purchase.

So, too, in a gift to A. for life with a direction that he was to have no power over the property beyond its legal vestment for conveyance, &c., and after his decease to his heirs, A. took only a life interest in the personalty, though he took the realty in fee. *Herrick v. Franklin*, 6 Eq. 593.

The better opinion seems now to be, that the court will not shrink from giving a different construction to the words heirs and heirs of the body as regards realty and personalty, though given together in the same clause. *Herrick v. Franklin*, *supra*.

Whether
the same
construc-
tion will be
adopted as
regards
realty and
personalty
where they
are given
together.

8. The word issue is less "mysteriously inflexible" than the words heirs of the body, and therefore in a gift of personalty to A. and his issue it may be a word of limitation or of purchase, in which latter case the same question arises as in gifts to A. and his children, whether

A. and the issue take jointly or whether the issue take subject to a life interest in A.

Bequests to
a person
and his
issue.

a. Primâ facie it seems a gift of personalty to A. and his issue, as it would give A. an estate tail in realty, gives him an absolute interest in personalty. This seems clear, when there is a gift over in default of issue, for the limitation over shows, that the gift is meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. *Lyon v. Michell*, 1 Mad. 467; *Beaver v. Nowell*, 25 B. 551; *Re Andrews' Will*, 27 B. 608; *Donn v. Penny*, 1 Mer. 20, 19 Ves. 544; *Gibbs v. Tait*, 8 Sim. 132.

And apparently the same rule will hold good even where there is no gift over. *Harvey v. Towell*, 7 Ha. 231; *Samuel v. Samuel*, 9 Jur. 222, but *quære*.

The case is stronger in favour of this construction, if it is a gift of realty and personalty together, or personalty is directed to go in the same way as realty. *Parkin v. Knight*, 15 Sim. 83; *Tate v. Clarke*, 1 B. 100.

In what
cases issue
will be a
word of
purchase.

b. If, however, there is any evidence, that the testator did not use the word as a word of limitation, by the use of expressions implying, either that the parent and issue take concurrently: *Clay v. Pennington*, 7 Sim. 370; *Law v. Thorp*, 27 L. J. Ch. 649; or that the issue take after the parent's death as purchasers: *Lampley v. Blower*, 3 Atk. 396; *Parsons v. Coke*, 4 Dr. 296; or that they are to take by substitution, by directing, for instance, that the issue are to take *per stirpes*: *Butter v. Ommaney*, 4 Russ. 70; *Pearson v. Stephen*, 5 Bl. N. S. 203; *Dick v. Lacy*, 8 B. 214; *Re Stanhope's Trusts*, 27 B. 201, the issue will take by purchase.

Bequests to
A. for life
and then to
his issue.

c. If the gift of personalty is to A. for life and then to his issue, whether there is a gift over in default of issue or not, A. takes only an estate for life. *Knight v. Ellis*,

2 Bro. C. C. 569; *Ex parte Wynch*, 5 D. M. & G. 188; *Goldney v. Crabb*, 19 B. 338.

And the same rule applies with regard to the personalty, where real and personal property are given together, unless there is something to show that the personalty was to go in the same manner as the realty.

“Except in a case where the personalty is either quite subordinate in value or a mere adjunct of the realty, as, for example, a leasehold garden held together with a freehold house, it is very difficult to give any sound logical reason for the proposition, that an intention that the two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than with those which would apply to a bequest of personalty alone.” *Per* Lord Hatherley, *Jackson v. Calvert*, 1 J. & H. 235.

But, though only a life estate may be given to the ancestor, if the issue are to take successively according to seniority, and not conjointly, issue will be treated as a word of limitation. *Jordan v. Lowe*, 6 B. 350.

II. GIFTS OF THE INCOME OF PROPERTY INDEFINITELY.

A gift of the income of property to a person, without more, is a gift of the capital, where no other disposition of the capital is made.

This is the case though the gift may be to the separate use, or through the medium of a trust. *Elton v. Shepherd*, 1 B. C. C. 532; *Phillips v. Chamberlayne*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. 39; *Boosey v. Gardner*, 18 B. 471; *Haig v. Swiney*, 1 S. & St. 487; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Watkins v. Weston*, 82 B. 238, 3 D. J. & S. 434; *Penny v. Pippin*, 15 W. R. 306.

Gift of
income
without
more is a
gift of
corpus

In the same way a gift of the income of property, with

a power superadded of disposing of it by will, is an absolute interest. *Southouse v. Bate*, 16 B. 132; *Weale v. Ollive*, 32 B. 421.

The fact, that legacies are given at the decease of the person, to whom the income is given indefinitely, will only cut down the absolute interest to the extent of the legacies. *Jennings v. Baily*, 17 B. 118.

Upon similar principles a gift of income to A. for life, and then to B. indefinitely, gives B. the absolute interest. *Clough v. Wynne*, 2 Mad. 188.

Contrary
intention.

But a gift of income to B. and C. and the survivor of them gives them only life interests. *Blann v. Bell*, 2 D. M. & G. 775.

III. PROPERTY AND POWER.

Gift to be
at the dis-
posal of a
person.

1. A gift to be at the disposal of A. is an absolute gift. *Nowlan v. Walsh*, 4 De G. & S. 584; *Re Maxwell's Will*, 24 B. 246; *Hoy v. Master*, 6 Sim. 568; *Kellett v. Kellett*, L. R. 3 H. L. 160.

Effect of a
power
super-
added to an
absolute
gift.

2. So if there is a gift to A. in general terms, a superadded power to dispose of the property in question by will, or at the donee's death, does not cut down the absolute gift. *Southouse v. Bate*, 16 B. 132; *Weale v. Ollive*, 32 B. 421; *Comber v. Graham*, 1 R. & M. 450; *Re Mortlock's Trust*, 3 K. & J. 456. See *Hales v. Margerum*, 3 Ves. 299; and *Bull v. Kingston*, 1 Mer. 314.

And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given. *Howorth v. Dewell*, 29 B. 18; *Brook v. Brook*, 3 Sm. & G. 280; *Reeves v. Baker*, 18 B. 372.

Of course a mere power to dispose of property among a certain class gives no property to the donee of the power. *Birch v. Wade*, 3 V. & B. 198; *Blakeney v.*

Blakeney, 6 Sim. 52. See *Acheson v. Fair*, 3 Dr. & War. 512.

3. But if the gift is to A. for life, with a superadded power to dispose of the whole for his own benefit, A. takes only a life interest if he does not exercise the power. *Archibald v. Wright*, 9 Sim. 161; *Bradley v. Westcott*, 13 Ves. 445; *Reith v. Seymour*, 4 Russ. 263; *Scott v. Josselyn*, 26 B. 174; *Pennock v. Pennock*, 13 Eq. 144.

Effect of a power superadded to a life interest.

In such a case the presentation of a petition for payment out of court amounts to an appointment, and entitles the legatee absolutely. *Holloway v. Clarkson*, 2 Ha. 521; *Cambridge v. Rouse*, 25 B. 574; *David's Trusts*, Johns. 495.

And when the tenant for life has power to go to the principal, only if the income is insufficient, she is entitled only to so much of the capital as will afford a suitable maintenance. *Re Pedrotti's Will*, 27 B. 588.

IV. EFFECT OF SUBSEQUENT RESTRICTIONS UPON ABSOLUTE INTERESTS.

In some cases there is an absolute gift in the first instance, out of which particular interests are subsequently carved. In such cases the rule is :—

“If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. But if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former the purpose is the benefit of the legatee as to the whole

Absolute interests cut down for a particular purpose remain so far as those purposes do not take effect.

amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee." *Per* Lord Cottenham, *Lassence v. Tierney*, 1 Mac. & G. 551.

Thus, if there is an absolute gift by a will, and restrictions are imposed upon the legatee's enjoyment by a codicil, the absolute gift remains so far as the restrictions do not extend. *Norman v. Kynaston*, 3 D. F. & J. 29; *Watkins v. Weston*, 3 D. J. & S. 434.

So when there is a valid appointment to objects of a power, with limitations or restrictions which are beyond the power, the invalid restrictions may be rejected. *Stephen v. Gadsden*, 20 B. 463; *Gerrard v. Butler*, *ib.* 541; *Churchill v. Churchill*, 5 Eq. 44; *Webb v. Sadler*, 14 Eq. 533, 8 Ch. 419.

But where there is no absolute gift, the legatees can take no more than is given them. *Savage v. Tyers*, 7 Ch. 356.

What is an absolute gift in the first instance.

The difficulty in these cases lies in ascertaining whether there is an absolute gift in the first instance or not. The question is whether the original gift is qualified by the words in which it is given: *Scawin v. Watson*, 10 B. 200; *Gompertz v. Gompertz*, 2 Ph. 107; *Lassence v. Tierney*, 1 Mac. & G. 551; or whether there is an independent gift, with a direction as to the mode of its enjoyment. *Campbell v. Brownrigg*, 1 Ph. 301; *Whittell v. Dudin*, 2 J. & W. 279; *Winckworth v. Winckworth*, 8 B. 576; *Mayer v. Townshend*, 3 B. 448; *McTear v. McDowell*, 11 Ir. Ch. 338; *Welply v. Cormick*, 16 Ir. Ch. 74; *Kellett v. Kellett*, L. R. 8 H. L. 160.

Power and trust.

When an absolute interest is cut down to a life estate, with a power of appointment among children, this does not mean, that the absolute interest is to be cut down, only if the donee appoints, but if there are children the

donee is bound to appoint to them. *Butler v. Gray*, 5 Ch. 26.

V. GIFTS BENEFICIAL OR IN TRUST.

On the question whether a gift is beneficial or in trust, the cases are numerous.

A. A gift to a person for some particular purpose, whether declared or not, creates a trust. *Corporation of Gloucester v. Wood*, 3 Ha. 131, 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419; see *Barrs v. Fewkes*, 2 H. & M. 60; 12 W. R. 666; 13 W. R. 987.

Words sufficient to create a trust.

So, too, the words "to the intent" create a trust. *Raikes v. Ward*, 1 Ha. 445.

And where an executrix had received a legacy for her trouble, a bequest of the residue to her, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes," was held to be in trust. *Briggs v. Penny*, 3 De G. & Sm. 525, 3 Mac. & G. 546; *Bernard v. Minshull*, Johns. 276.

B. The cases are more difficult, where the intention is to give the donee a beneficial interest, but there is a recommendation to apply the property for the benefit of certain objects. In such cases the court will imply a trust if the property to be subject to, and the objects to be benefited by, the implied trust are sufficiently certain.

Precatory trusts.

1. It must be clear that the testator intends the property he has bequeathed, or some part of it, to be applied by the donee for the purposes of the trust.

It must be clear what property is to be subject to the trust.

a. Therefore mere expressions of a desire that the donee will be kind to: *Buggins v. Yates*, 9 Mod. 122; 8 Vin. Ab. 72, pl. 27; remember: *Bardswell v. Bardswell*, 9 Sim. 319; consider: *Sale v. Moore*, 1 Sim. 534; deal justly by: *Pope v. Pope*, 10 Sim. 1; educate and provide for: *Macnab v. Whitbread*, 17 B. 299; *Winch v. Brutton*, 14

Sim. 379; *Fox v. Fox*, 27 B. 301; or do justice to: *Ellis v. Ellis*, 23 W. R. 382, a certain class of persons will raise no trust.

b. Though some property may be mentioned out of which the trust is to be performed, this is not enough, if it is not clear what the property is; as if the donee is requested to give "whatever she can transfer:" *Flint v. Hughes*, 6 B. 342; or the bulk: *Palmer v. Simmonds*, 2 Dr. 221; or if the precatory words apply not only to the property given by the testator, but to all the property of the legatee: *Eade v. Eade*, 5 Mad. 118; *Lechmere v. Lavie*, 2 M. & K. 197. See *Knight v. Boughton*, 8 B. 148, 11 Cl. & F. 513.

c. As there can be no gift over of what a legatee does not dispose of, so no trust will be fixed upon it. *Bland v. Bland*, 2 Cox, 349; *Wilson v. Major*, 11 Ves. 205; *Pushman v. Filliter*, 3 Ves. 7; *Cowman v. Harrison*, 10 Ha. 234; *Green v. Marsden*, 1 Dr. 646.

Request to
employ a
person as
agent.

d. Upon similar principles a request that a particular person may be employed as manager or receiver of the testator's property is not obligatory. *Shaw v. Lawless*, 5 Cl. & F. 129; *Finden v. Stephens*, 2 Ph. 142.

Though, on the other hand, the express appointment by the testator of a particular person as agent or receiver will have effect given to it. *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349: see *Belaney v. Kelly*, 19 W. R. 1171.

The objects
of the
trust must
be reason-
ably cer-
tain.

2. If the donee has a wide discretion as to the objects to be benefited, so that it is uncertain, whom the testator meant, no trust will be raised.

a. Thus, where there is absolute power of disposal, with a confidence expressed, that the donee will dispose of the property according to the testator's wishes, where none are expressed, there is no trust. *Reid v. Atkinson*, I. R. 5 Eq. 162, 373; *Creagh v. Murphy*, I. R. 7 Eq. 182.

b. Though words are used, such as "family," "relations," or "heirs," to which the court would give a meaning in a direct gift, no trust will be implied if it is uncertain what the testator meant by them. *Harland v. Trigg*, 1 B. C. C. 141; *Wright v. Atkyns*, 17 Ves. 255, 1 V. & B. 813, 19 Ves. 299, T. & R. 162, Sug. Prop. 388; *Williams v. Williams*, 1 Sim. N. S. 358; *Green v. Marsden*, 1 Dr. 646; *Meredith v. Heneage*, 1 Sim. 542; *Bernard v. Minshull*, Johns. 276; *Greene v. Greene*; I. R. 3 Eq. 90, 629.

3. No trust will be implied from precatory words :

a. Where the donee may at his discretion apply the property to other purposes. *Lefroy v. Flood*, 4 Ir. Ch. 1; *Curtis v. Rippon*, 5 Mad. 434; *House v. House*, 23 W. R. 22; *Ex parte Payne*, 2 Y. & C. Ex. 636.

Precatory words may be explained so as not to raise a trust.

b. Or where there is an express direction that the donee's absolute interest is not to be curtailed. *Huskinson v. Bridge*, 15 Jur. 738; *Eaton v. Watts*, 4 Eq. 151.

c. Where the precatory words are stated not to be obligatory. *Young v. Martin*, 2 Y. & C. C. 582.

d. Or where the donee is to take free and unfettered. *Meredith v. Heneage*, 1 Sim. 542, 10 Pr. 306; *Hoy v. Master*, 6 Sim. 568; *White v. Briggs*, 15 Sim. 33.

4. Where, however, there is sufficient certainty on the points already mentioned, a trust may be implied from any of the following expressions :

What words are sufficient to raise a precatory trust.

a. Words of confidence, such as "trusting:" *Baker v. Mosley*, 12 Jur. 740; *Irvine v. Sullivan*, 8 Eq. 673; "confiding:" *Griffiths v. Evan*, 5 B. 241; "not doubting:" *Parsons v. Baker*, 18 Ves. 476; "firm conviction:" *Barnes v. Grant*, 26 L. J. Ch. 92.

b. Words of request and entreaty, such as "entreat:" *Prevost v. Clarke*, 2 Mad. 458; "require and entreat:" *Taylor v. George*, 2 V. & B. 378; "wish and request:" *Foley v. Parry*, 5 Sim. 138, 2 M. & K. 138; "dying request:" *Pierson v. Garnet*, 2 B. C. C. 37, 226; "request:"

Eade v. Eade, 5 Mad. 118; "dying wish:" *Godfrey v. Godfrey*, 11 W. R. 554; "last will:" *Hinxman v. Poynder*, 5 Sim. 546; "wish and desire:" *Liddard v. Liddard*, 28 B. 266; "desire:" *Harding v. Glyn*, 1 Atk. 469.

e. Even words of advice and recommendation, such as "advise:" *Parker v. Bolton*, 5 L. J. Ch. 98; "recommend:" *Tibbets v. Tibbets*, 19 Ves. 656, Jac. 317; *Horwood v. West*, 1 S. & St. 387; *Ford v. Fowler*, 3 B. 146; *Malim v. Keighley*, 2 Ves. jun. 333, 529.

C. As to the interest taken by the donee in trust:

Distinction
between a
gift subject
to trusts
and a gift
upon
trusts.

1. If there is a gift *subject* to trusts, the donee takes whatever is not required for the performance of those trusts. *Dawson v. Clarke*, 15 Ves. 409, 18 Ves. 247; *King v. Denison*, 1 V. & B. 261; *Fenton v. Hawkins*, 9 W. R. 300; *Clarke v. Hilton*, L. R. 2 Eq. 810.

2. On the other hand, if the gift is *upon* trust, the donee takes the whole upon trust for the purposes declared; or for the heir at law or next of kin, if those purposes fail, or are not exhaustive or not declared. *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Countess of Bristol v. Hungerford*, ib. 645; *Kellett v. Kellett*, 1 Ba. & Be. 533, 3 Dow. 248; *Watson v. Hayes*, 5 M. & Cr. 125; *Mullen v. Bowman*, 1 Coll. 197; *Andrews v. Andrews*, 1 Coll. 186; *Love v. Gaze*, 8 B. 472.

Gift upon
condition
may raise
a trust.

It may be noticed that a devise of property, upon condition of making certain payments out of it, which are shown on the face of the instrument, to exhaust the whole, is in effect a gift of the whole upon trust, and not subject to trusts. *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1; *A.-G. v. Merchant Tailors*, 6 Ch. 512; and see *Bird v. Harris*, 9 Eq. 204.

In what
cases the
donee
takes the
whole on
trust.

3. Again, where the gift is to the donee indefinitely, without words expressly giving a beneficial interest, followed by precatory words, which raise a trust in favour of a particular class, the donee takes the whole in trust; as

where the gift was to the testator's wife, under the firm conviction that she would dispose of and manage the same for the benefit of her children. *Barnes v. Grant*, 2 Jur. N. S. 1127, 26 L. J. Ch. 92.

So a gift, without words of benefit superadded, for some particular purpose, whether declared or not, raises a trust as to the whole. *Corporation of Gloucester v. Wood*, 3 Ha. 181, 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419.

Where the gift is in trust, the fact that the donee is described as wife or relation of the testator, or that a legacy is given to the heir, will not entitle such donee to any beneficial interest. *Wych v. Packington*, 3 B. P. C. 44; *Wills v. Wills*, 1 Dr. & War. 439; *Starkey v. Brooks*, 1 P. W. 390.

4. If, however, words of benefit are superadded; if, for instance, the gift is to A. for his own use and benefit, or absolutely, followed by words which raise a trust, the donee takes beneficially, subject to those trusts. *Wood v. Cox*, 5 M. & Cr. 684; *Shelley v. Shelley*, 6 Eq. 540; *Irvine v. Sullivan*, 8 Eq. 678.

Cases where the donee in trust is intended to take some interest.

But the case is different if such words as "for her sole use and benefit" can be shown to be inserted merely for the purpose of excluding a husband from the trust, as in *Stubbs v. Sargon*, 2 Kee. 255, 3 M. & Cr. 507, where the gift was to A. for her sole use and benefit, independent of her husband, for an express purpose.

5. So, though the gift may be upon trust, it may appear that the donee is intended to take some beneficial interest by the fact that the testator calls her his heiress, or expressly excludes his heir from any benefit. *Rogers v. Rogers*, 3 P. W. 193; *Hughes v. Evans*, 13 Sim. 496; see *Williams v. Roberts*, 27 L. J. Ch. 177, 4 Jur. N. S. 18.

6. Again, the trust may not arise till the death of the donee upon trust, in which case he will take beneficially during his life.

Cases where the trust does not arise till the

death of
the donee.

a. Where there are words of indefinite gift followed by a recommendation or entreaty that the donee will at his decease give the property to a certain class, this raises a trust subject to his life interest. *Pierson v. Garrett*, 2 B. C. C. 38, 226 ; *Malim v. Keighley*, 2 Ves. jun. 333, 529 ; *Cholmondeley v. Cholmondeley*, 14 Sim. 590 ; *Prevost v. Clarke*, 2 Mad. 458.

The same construction was adopted, where there was an intention, that the donee was not to dispose of the capital in her lifetime followed by a recommendation to give the property in a certain way. See *Horwood v. West*, 1 S. & St. 387.

b. So, too, where the gift is to A. *for his own sole use and benefit*, with an expression of desire or confidence that he will dispose of it among a certain class during his life and at his decease, the donee takes a life interest with a power of appointment by deed or will. *Harding v. Glyn*, 1 Atk. 469 ; *Curnick v. Tucker*, 17 Eq. 320 ; *Fordham v. Speight*, 23 W. R. 782.

c. And even where there was a gift to A. *to and for his sole use and benefit*, subsequent words, expressive of confidence that the donee would apply the same for her children *thereafter*, were held to give an interest for life with a power of appointment. *Gully v. Cregoe*, 24 B. 185.

And even in the absence of anything to show that the donee was intended to take a life interest, the same construction has been adopted. *Ware v. Mallard*, 21 L. J. Ch. 355, 16 Jur. 492 ; *Shovelton v. Shovelton*, 32 B. 143.

Cases where
the donee
in trust is
herself one
of the
objects of
the trust.

d. Where a power is given to a person to dispose of property for herself and her children, she does not take an absolute interest. *Crockett v. Crockett*, 2 Ph. 553.

Nor will the legatee take absolutely where property is given to a legatee on trust for herself and her children : *Costabadie v. Costabadie*, 6 Ha. 410 ; *Godfrey v. Godfrey*, 11 W. R. 554 ; or to be applied for herself and her

children: *Bibby v. Thompson*, 32 B. 646; or to be used for the benefit of herself and her children, at the discretion of the donee: *Hart v. Tribe*, 32 B. 279, 1 D. J. & S. 418; *Godfrey v. Godfrey*, 11 W. R. 554; *Newill v. Newill*, 7 Ch. 253; *Armstrong v. Armstrong*, 7 Eq. 518; see *Scott v. Key*, 13 W. R. 1030.

And even a life interest given to the testator's wife for the benefit of herself and her children is divisible equally among them. *Jubber v. Jubber*, 9 Sim. 503; see *Taylor v. Bacon*, 8 Sim. 100.

If, however, the gift is to A. with large powers of disposition or words of benefit added, the fact, that the gift is expressed to be for the benefit of herself and her children, will not raise a trust. *Lambe v. Eames*, 10 Eq. 267, 6 Ch. 597. See *Webb v. Wools*, 2 Sim. N. S. 267.

And where there is an absolute gift to A., a subsequent declaration that the benefit of A. and her children was the motive of the gift will raise no trust. *Thorp v. Owen*, 2 Ha. 607. See *Mackett v. Mackett*, 14 Eq. 49; *Briggs v. Sharp*, 20 Eq. 317.

Distinction between trust and motive.

Similarly a gift to enable a person to do something creates no trust. *Benson v. Whittam*, 5 Sim. 22; *Ryan v. Keogh*, 1. R. 4 Eq. 357. See *Biddles v. Biddles*, 16 Sim. 1; *quære*, whether *Byne v. Blackburn*, 26 B. 41, can stand on this ground.

And where the interest upon legacies given to children is directed to be paid to their parents, and applied by them for their maintenance, the parents take subject to no account. *Hammond v. Neame*, 1 Sw. 35; *Berkeley v. Swinburne*, 6 Sim. 613; *Hadow v. Hadow*, 9 Sim. 438; *Browne v. Paull*, 1 Sim. N. S. 92.

Gifts to the parent to be applied for the maintenance of his children.

In the same way a gift to the parent for the benefit or maintenance of himself and his children may be safely paid to the parent. *Cooper v. Thornton*, 3 B. C. C.

96, 186 ; *Robinson v. Tickell*, 8 Ves. 142 ; *Re Robertson's Trust*, 6 W. R. 405.

VI. LEGACIES GIVEN TO BENEFIT A LEGATEE IN A PARTICULAR WAY.

Legacy to a legatee to be applied in a particular way for the benefit of the legatee.

1. A legacy given to a person for a particular purpose for the benefit of the legatee, is good though the purpose fails or becomes incapable of execution. *Barton v. Grant*, 1 Vern. 255 ; *Nevill v. Nevill*, 2 Vern. 481 ; *Barton v. Cooke*, 5 Ves. 462 ; *Parsons v. Coke*, 6 W. R. 715 ; *Lockhart v. Hardy*, 9 B. 379 ; *Leche v. Lord Kilmorey*, T. & R. 207 ; *Palmer v. Fowler*, 13 Eq. 250.

Gift to purchase an annuity.

So, too, the gift of an annuity, or of a sum to purchase an annuity, vests a sum equivalent to the value of the annuity in the legatee at the testator's death, whether the annuity is in possession or reversion. *Yates v. Compton*, 2 P. W. 308 ; *Barnes v. Rowley*, 8 Ves. 305 ; *Palmer v. Crawford*, 8 Sw. 482 ; *Bayley v. Bishop*, 9 Ves. 6.

And a discretionary power to purchase an annuity out of a fund authorises advances to the legatee from time to time out of the fund. *Messeena v. Carr*, 9 Eq. 260.

Discretion to trustees to apply money in a certain way for a legatee.

2. On the other hand, where a discretion is given to trustees to apply money to a particular purpose, the Court will inquire whether the occasion for the gift arises. *Lewis v. Lewis*, 1 Cox, 162 ; *Robinson v. Cleaton*, 15 Ves. 526 ; *Cowper v. Mantell*, 22 B. 231 ; *Sanderson's Trust*, 3 K. & J. 497 ; *Re Ward's Trust*, 7 Ch. 727.

Distinction where the purpose is not merely the benefit of the legatee.

3. And if the purpose for which the money is given is not merely the benefit of the legatee, but also the gratification of some wish of the testator, the question is, which is the primary object. *Re Skinner's Trust*, 1 J. & H. 102. *fort v. haime 3 Ch. & 278*

CHAPTER XXII.

GIFTS OF ANNUITIES.

I. CHARACTERISTICS OF ANNUITIES.

AN annuity charged upon lands devised in fee is a legal rent-charge, even though it may be given to a person, his executors and administrators. *Ramsay v. Thorngate*, 16 Sim. 575.

Annuity and rent-charge distinguished.

And a right to distrain is attached to it by statute 4 Geo. II., c. 28, s. 5. *Buttery v. Robinson*, 3 Bing. 392; *Sollory v. Leaver*, 9 Eq. 22; *Kelsey v. Kelsey*, 17 Eq. 496.

And a rent-charge, though charged upon realty and personalty, will be looked upon as issuing out of the realty alone. *Butt's Case*, 4 Rep. 98, Pt. 7, 23 a, Co. Litt. 147 a; *Richardson v. Nixon*, 7 Ir. Eq. 620; *Sollory v. Leaver*, 9 Eq. 22.

The rule in *Shelley's Case* and the other technical rules of construction apply to the limitations of a rent-charge. *Drew v. Barry*, I. R. 7 Eq. 413; 8 *ib.* 260.

The rule in *Shelley's case* applies to the limitations of a rent-charge.

An annuity, though given out of personal assets, if given with words of inheritance, will devolve like real estate.

Annuity to a man and his heirs devolves like real estate.

Annuities, however, not being within the *Statute de donis*, cannot be entailed, and an annuity to A. and the heirs of his body gives only a base fee. *Chaplin v. Chaplin*, 3 P. Wms. 229; *Turner v. Turner*, Amb. 776; 1 B. C. C. 316.

Annuities are not within the *Statute de donis*.

Annuity given to a man and his heirs remains personalty except for purposes of devolution.

But an annuity, though given with words of inheritance, is, for all other purposes except descent, personalty. *Earl of Stafford v. Buckley*, 2 Ves. sen. 171; *Lady Holderness v. Lord Carmarthen*, 1 B. C. C. 377; *Aubin v. Daly*, 4 B. & Ald. 59; *Radburn v. Jervis*, 3 B. 450.

And an annuity charged upon realty, but given without words of limitation appropriate to realty, is personal estate. *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, 8 Eq. 260.

II. THE DURATION OF GIFTS OF ANNUITIES AND ANNUAL SUMS.

Annuity whether for life or perpetual.

1. When an annuity is given to a person without more, the question arises, whether it was meant to be for life only, or perpetual; and this point, in the case of annuities created *de novo*, is unaffected by sect. 28 of the Wills Act. *Nicholls v. Hawkes*, 10 Ha. 342.

Prima facie a gift of an annuity is for life only.

The presumption is, that an annuity given simply is for life only, whether it is given to a single legatee, or to A. for life, and then to B. simply, or to A. with power to give it after his death to another, or to several others and the survivor. *Blewitt v. Roberts*, 10 Sim. 491, Cr. & Ph. 274; *Yates v. Maden*, 3 Mac. & G. 532.

But an intention may be gathered from the will, that the annuity is to be perpetual, and no particular words of limitation are necessary for this purpose. Thus :

Gift of property to produce, or direction to purchase an annuity.

a. An annuity is perpetual if there is a gift of property to produce it, whether it be a dedication of a specific portion of property, or only a direction to purchase an annuity in Government funds or securities. *Stokes v. Heron*, 12 Cl. & F. 161; *Kerr v. Middlesex Hosp.*, 2 D. M. & G. 576; *Hicks v. Ross*, 14 Eq. 141; *Ross v. Borer*, 2 J. & H. 469. *Grove's Trusts*, 1 Giff. 74, is probably irreconcilable with the other authorities.

b. If the annuity is given as part of the income of a particular fund, it amounts to a gift of so much of the fund itself. *Bignold v. Giles*, 4 Dr. 343; *Courtenay v. Gallagher*, 5 Ir. Ch. 154, 356; *Rawlings v. Jennings*, 13 Ves. 39; *Potter v. Baker*, 13 B. 273, 15 B. 489; *Bent v. Cullen*, 6 Ch. 235. *Evans v. Walker* 3 Ch. D. 211.

Gift of part of annual income of a fund.

c. But a mere devise of all the testator's property on trust to pay an annuity or a charge on a certain fund will not make the annuity perpetual. *Lett v. Randall*, 3 Sm. & G. 83; 2 D. F. & J. 388; *Sullivan v. Galbraith*, I. R. 4 Eq. 582; *Wilson v. Maddison*, 2 Y. & C. C. 372. See *Innes v. Mitchell*, 6 Ves. 464, 9 Ves. 212.

Gift of testator's property to pay an annuity will not make it perpetual.

d. If the annuity is directed to cease if the legatee dies without issue, or is directed not to be sold till after the death of the legatee, there is a strong argument that it was meant to be perpetual. *Hedges v. Harpur*, 3 De G. & J. 129; *Pawson v. Pawson*, 19 B. 146.

Direction for cesser or sale at a certain time.

e. Or again, if the legatee has a power of appointing the annuity in words that would authorize the appointment of a perpetual annuity, or the annuity is given over in certain events in fee, the same argument arises. *Wright v. Wright*, 12 Ir. Ch. 401; *Robinson v. Hunt*, 4 B. 450.

Powers of appointing the annuity in fee.

f. And if the annuity, being given to several persons as tenants in common, is given over in its entirety at a period when, if it were only for the life of the legatees it might have partially determined, it will be perpetual, as it would be absurd to suppose that it is to cease upon the death of a prior annuitant and to revive again in certain events. *Mansergh v. Campbell*, 3 De G. & J. 237; *Barden v. Meagher*, I. R. 1 Eq. 246.

Limitations inconsistent with a mere life interest.

g. See, too, *Parsons v. Parsons*, 8 Eq. 260, where an annuity, given to several or their heirs, was held to be perpetual, though the heirs took by substitution.

Gift of annuities to several or their heirs.

2. Implication of survivorship between annuitants :

A bequest of an annuity to two persons for their

Gift of an annuity to

two persons
for their
lives.

lives goes to the survivor for his life, though the annuitants may be husband and wife. *Moffat v. Burnie*, 18 B. 211; *Neighbour v. Thurlow*, 28 B. 33; *Alder v. Lawless*, 32 B. 72. See *Day v. Day*, Kay, 703.

Gift to two
as tenants
in common
for their
lives.

As to the construction of a bequest of an annuity to two persons as tenants in common for their lives without more, see *Lill v. Lill*, 23 B. 446; *Grant v. Winbolt*, 2 W. R. 151, 23 L. J. Ch. 282.

Effect of a
gift over on
the con-
struction of
a gift to
several as
tenants in
common
for their
lives.

Where the gift is to two persons as tenants in common for their lives, with a gift over after their death :

a. If the gift over is expressly after the death of the survivor, benefit of survivorship will be implied between the annuitants. *Armstrong v. Eldridge*, 3 B. C. C. 215.

b. So, if the gift over is not till after the death of both, or the whole is given after their death as one undivided fund, the survivor will take the whole. *Tuckerman v. Jeffries*, 3 Bac. Abr. ed. Gw. 681, 11 Mod. 108; *M'Dermott v. Wallace*, 5 B. 142; *Draycott v. Wood*, 8 L. T. N. S. 304.

Gift over
after the
death of
the survi-
vor.

Gift over
after the
death of
all the
tenants for
life.

The same rule applies though the gift is expressly to A. and B. for their *joint* lives, if nothing is given over till after the decease of both. *Townley v. Bolton*, 1 M. & K. 148.

Gift over
after the
death of
the an-
nuitants
and a third
person.

c. This implication of survivorship, however, does not arise, where the gift over is not merely after the death of the annuitants, but after the death of the annuitants and some other person who cannot have been intended to take by survivorship. *Re Drakeley's Estate*, 19 B. 395.

Nor can it arise, where the shares of legatees dying are expressly disposed of during the period between the death of each and the death of all. *Walmsley v. Foxall*, 1 D. J. & S. 605.

Meaning of
"every."

As to the meaning of "every" in a gift over after the death of every of the annuitants, see *Brown v. Jarvis*, 2 D. F. & J. 168.

d. If the gift over is to the children of the annuitants, the most obvious construction is that the share of each goes over immediately on his death to his children. See p. 151, *ante*.

Cases where the gift over is to the children of the tenants for life.

But if it is clear that nothing is given to the children till after the death of all the tenants for life, the survivor takes the whole. *Begley v. Cooke*, 3 Dr. 662; *Alt v. Gregory*, 8 D. M. & G. 221. See *Minton v. Minton*, 9 W. R. 586.

In such cases the fact that the distribution is to be *per capita*, and not *per stirpes*, would be an argument, that the distribution was to be postponed till the death of the surviving tenant for life. See *Pearce v. Edmeades*, 3 Y. & C. Ex. 246, 2 W. R. 672.

Arguments in favour of postponing distribution till the death of the surviving tenant for life.

It seems also that if the gift after the death of the annuitants is to their heirs *per capita*, this would afford a strong argument for implying a life interest in the surviving annuitants; but the case is different if the gift over is to the heirs of the annuitants and of other persons. *Hensley v. Wills*, 14 W. R. 423.

e. Where, however, the duration of the annuity is clearly defined by the original gift, as for instance, where the gift is to several as tenants in common for their lives and the life of the survivor, the shares of those dying during the duration of the annuity pass to their representatives. *Jones v. Randall*, 1 J. & W. 100; *Eales v. Cardigan*, 9 Sim. 384; *Bryan v. Twigg*, L. R. 3 Eq. 433, 3 Ch. 183; *Chatfield v. Berchtoldt*, 18 W. R. 887.

There can be no implication of survivorship where the duration of the annuity is clearly defined by the original gift.

It is submitted, that in such a case a gift over after the death of the survivor of the annuitants can have no influence on the construction; see, however, the decree of Sir W. Grant in *Avern v. Lloyd*, 5 Eq. 383.

There may, however, in such a case, be words to show that the survivor was to take the whole. Thus, if the

Words amounting to an ex-

press gift
to the sur-
vivor.

gift is to several as tenants in common "for their lives, or the life of the survivor, for *their or her* absolute use," or "for their lives and the life of the survivor during *their and her* natural life," the additional words show that the survivor was meant to take the whole. *Hatton v. Finch*, 4 B. 186; *Cranswick v. Pearson*, 31 B. 624, affd. 9 L. T. N. S. 275; and in *Doe d. Borwell v. Abey*, 1 Mau. & S. 428, the gift over "from and after their *respective deceases* and the decease of the survivor," indicated that the representatives of annuitants were not to take anything after their respective deaths.

3. Distinction between annuities given for a period and for an object:

Annuity
given for
fixed period
for main-
tenance
does not
determine
with
minority.

Similarly, an annuity given to a person for a fixed period for maintenance is not determined by the attainment of majority, or by death before that period. *Badham v. Mee*, 1 R. & M. 631; *Longmore v. Elcum*, 2 Y. & C. C. 363; *Lewes v. Lewes*, 16 Sim. 266; *Atwood v. Alford*, L. R. 2 Eq. 479.

This, however, does not apply where the duration of the annuity is merely the duration of the legal estate: if, for instance, the annuity is given to trustees for their lives, and the life of the longest liver of them, for the support of A. *Ryan v. Keogh*, 1 R. 4 Eq. 357.

Annuity for
main-
tenance deter-
mines with
minority.

And the gift of an annual sum to a child for maintenance and education ceases with his minority. *Foley v. Parry*, 2 M. & K. 138; *Gardner v. Barker*, 18 Jur. 508.

So, too, a gift to a trustee, so long as he should continue to execute the office of trustee under the will, ceases with the active trusts. *Baker v. Martin*, 8 Sim. 25; *Hull v. Christian*, 17 Eq. 546.

Whether a
gift to a
person
during the
minority of

It is clear that a gift of rents and profits to a parent during the minority of a child, where no benefit is intended for the child, will go to the representatives of the

parent if he dies during the minority. *Smith v. Havers*, Cro. Eliz. 252; *Laxton v. Eedle*, 19 B. 321.

an infant
determines
with the
infant's
death.

On the other hand, if the child dies during his minority, the parent will, nevertheless, be entitled to the rents and profits till the time when the child, if living, would have attained twenty-one, if the object of the gift is payment of debts. *Carter v. Church*, 1 Ch. Ca. 113; *Boraston's Case*, 3 Co. 19 a.

And it would seem that the construction would be the same if the object of the term is the benefit of the person to whom the rents and profits are given during the minority. *Coates v. Needham*, 2 Vern. 65. See 1 Jarm. 546.

On the other hand, if the term is created for the benefit of the child, or if the object of it is merely to postpone the interest of the child till he should have performed some condition, which could not be performed after his death, the term will determine with his life. See *Manfield v. Dugard*, 1 Eq. Ca. Abr. 194, pl. 4, where the report is very unsatisfactory. *Lomax v. Holmedon*, 3 P. W. 176; and see *Castle v. Eate*, 7 B. 296.

CHAPTER XXIII.

CONDITIONS PRECEDENT.

CONDITIONS DISTINGUISHED.

1. THE court is never astute to construe a testator's words as importing a condition if a different meaning can be fairly given to them.

Condition
and trust.

Thus, a devise "upon condition" that the devisee makes certain payments within a given time will, as a rule, be construed as a trust, and not as a condition. *Young v. Grove*, 4 C. B. 668; *Wright v. Wilkin*, 9 W. R. 161, 10 W. R. 403; see *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1; *A.-G. v. Merchant Taylors*, 6 Ch. 512; and see *Bird v. Harris*, 9 Eq. 204.

Condition
and limita-
tion.

2. In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M. and the heirs of her body, on condition that she marry and have issue male by S., was held to give an estate in special tail to M. *Page v. Hayward*, 2 Salk. 570.

Similarly, an estate to arise upon a condition, which cuts down a previous estate will, if possible, be construed as a remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A. for life if she should not marry again, but if she did, to B., will be construed as a devise to A. for life or till marriage. *Luxford v. Cheek*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Ventr. 203; *Gordon v. Adolphus*, 3 B. P. C. 306.

So, too, if the gift for life is made "subject to the proviso hereinafter contained," the proviso is incorporated into the original limitation. *Webb v. Grace*, 2 Ph. 701.

Devise for life subject to a proviso.

And a bequest to A. for life, if she should so long remain unmarried, will be construed in the same way. *Heath v. Lewis*, 3 D. M. & G. 954.

On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield v. Lord Orrery*, 3 Atk. 282; see *Allen v. Jackson*, 1 Ch. D. 399.

In such a case, however, it may appear that the original estate was only meant to last till the condition takes effect: if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds v. Wood*, 19 B. 215.

Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith d. Dormer v. Parkhurst*, 18 Viner, fol. 413, 3 Atk. 135, 4 B. P. C. 353.

Estate of trustees to preserve.

CHARACTERISTICS OF CONDITIONS PRECEDENT.

Whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the point. It may, however, be noticed, that when the condition requires something to be done, which will take time, the argument is in favour of construing it as a condition subsequent. *Popham v. Bampfild*, 1 Vern. 79, 1 Eq. Ab. 108, pl. 2; *Peyton v. Bury*, 2 P. W. 626.

General test of condition precedent.

On the other hand, a condition, which involves anything in the nature of consideration, is in general a condition precedent. *Acherley v. Vernon*, Willes, 153; *In Re Wellstead*, 25 B. 612.

Condition precedent whether impossible, impolitic, or illegal, must be fulfilled in the case of realty.

If a devise be made to take effect only on performance of some particular duty by the devisee, or upon some particular event, there is no gift unless the condition is fulfilled. And it makes no difference that the event is impossible, impolitic, or illegal. See *Egerton v. Earl of Brownlow*, 4 H. L. 1; *Priestley v. Holgate*, 3 K. & J. 286; see *Caldwell v. Cresswell*, 6 Ch. 278.

In personalty condition precedent involving a physical impossibility is invalid.

But as regards personalty, a gift made upon a condition precedent involving a physical impossibility, such as to drink up the ocean, takes effect notwithstanding the condition. See 1 Swin., Part IV., sec. 6, p. 257, Co. Lit. 206 b.

But if the condition precedent, though in fact impossible at the date of the will, or becoming impossible by subsequent events, involves no physical impossibility, the gift will not take effect. *Lowther v. Cavendish*, 1 Ed. 99, 116; *Robinson v. Wheelwright*, 21 B. 214; 6 D. M. & G. 535.

Condition discharged by testator.

And as regards realty and personalty, a condition precedent which becomes impossible by the act of the testator is discharged. Co. Lit. 206 b., sec. 334; *Gath v. Barton*, 1 B. 478; *Darley v. Langworthy*, 3 B. P. C. 359.

Condition *contra bonos mores*.

And in personalty a condition precedent which is *contra bonos mores* may be rejected, leaving the gift absolute. *Brown v. Peck*, 1 Ed. 140; *Wren v. Bradley*, 2 De G. & Sm. 49.

VESTING OF REAL ESTATE.

General leaning in favour of vesting.

The courts lean strongly in favour of early vesting. "Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates or the rents and profits of such estates. Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they

are to become vested. Testators who create contingent estates often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention, and not from the bounty of, the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained while estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience and sometimes of injury to them. If the attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age, children lose estates which were intended for them, and which their relation to the testator may give them the strongest claim to." Per Best, C. J., *Duffield v. Duffield*, 3 Bl. N. S. 380 ; 1 Dow N. S. 310.

A devise to A. and his heirs "if" or "when" he attains 21 is contingent according to the opinion of Fearne, Post. Works, 191. So, too, "a devise in remainder to a class of children if they attain 21 is a contingent remainder. It is also a contingent remainder if it be a devise to a class of children equally at the age of 21. And so also it is a contingent remainder if it be a devise in remainder to children who shall attain the age of 21." Per Stuart, V.-C., in *Browne v. Browne*, 3 Sm. & G. 587; *Alexander v. Alexander*, 16 C. B. 59.

Devise
"when"
or "if" is
contingent.

Cases, however, where the condition as to attaining a

Condition
requiring

the attainment of a certain age may sometimes be subsequent.

certain age forms part of the original devise, must be distinguished from those cases, where the condition is contained in a separate direction; thus, where there has been an immediate devise followed by a clause directing that the devisee "is not to be of age to receive this" till he attains a certain age, or that it is to become his property on attaining 25, the devisee has taken a vested interest subject to be divested. *Snow v. Poulden*, 1 Kee. 186; *Attwater v. Attwater*, 18 B. 330.

So, too, a devise to A., provided she lives to attain 21, has been held vested subject to be divested. *Simmonds v. Cocks*, 29 B. 455, where the devise was after a life estate.

Express direction as to vesting.

Of course, when there is an express direction as to the period of vesting, nothing can vest before the appointed time: *Russell v. Buchanan*, 2 Cr. & M. 561, 7 Sim. 628; though on the other hand the question of vesting is not affected by a direction merely referring to the period of possession: *Montgomerie v. Woodley*, 5 Ves. 522; *Shrimpton v. Shrimpton*, 31 B. 425.

Cases in which a devise to A. at or when or if he attain 21 is vested.

A devise to A., at or when or if he attain 21, will be vested:

Prior devise till A. attain 21.

1. If an estate is given prior to the attainment of 21 by the ultimate devisee to some third person either for the benefit of the devisee himself: *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; *Re Mottram*, 10 Jur. N. S. 915; or for the benefit of some other persons to endure during the minority: *Boraston's Case*, 3 Rep. 19 a.; *Manfield v. Dugard*, 1 Eq. Ab. 195, pl. 4.

In this case the estate given to the devisee on attaining 21 is in fact only a remainder taking effect in its natural order on the determination of the preceding estate.

Prior devise for life.

2. And a devise to A. for life, and *from and after* his decease to B., if he shall have attained 21 years, or so

soon as he shall arrive at that age, was, in *Andrew v. Andrew*, 1 Ch. D. 410, held to give B. a vested interest at birth, owing to the words "from and after," which were held to mean immediately after; but see *Alexander v. Alexander*, 16 C. B. 59.

Whether a devise in remainder after a life estate to B. if he attains 21 in the absence of the words "from and after" would give B. a vested interest subject to be divested seems doubtful, though the remarks in *Andrew v. Andrew*, *sup.*, are in favour of such a construction; but see *Blagrove v. Hancock*, 16 Sim. 371; *Simmonds v. Cocks*, 29 B. 455.

3. However, if there is a gift over upon death under 21, the gift over shows that the first devisee is to take whatever interest the person claiming under the devise over is not entitled to, that is to say, the immediate interest. *Bromfield v. Crowder*, 1 B. & P. N. R. 313; see 14 East, 604; *Doe d. Roake v. Newell*, 1 Mau. & S. 327, 5 Dow. 202; *Edwards v. Hammond*, 3 Lev. 132; *Doe d. Hunt v. Moore*, 14 East, 601; *Phipps v. Ackers*, 3 Cl. & Fin. 691, 9 ib. 583; *Whitter v. Bremridge*, L. R. 2 Eq. 736.

Gift over
upon death
under 21.

And the argument in favour of vesting is still stronger, if the gift over is upon death before the given time without issue. *Finch v. Lane*, 10 Eq. 501.

The attainment by the devisees of the given age is a certainty provided they live long enough; if, however, the contingency is some other event, as remainder to A. if he survives B., the estate is not vested till the event happens, notwithstanding the gift over. *Doe d. Planner v. Scudamore*, 2 B. & P. 289; *Price v. Hall*, 5 Eq. 399.

And of course the gift over can have no effect where there is an express direction as to the time of vesting. *Russell v. Buchanan*, 2 Cr. & Mee. 561, 7 Sim. 628.

4. There is, however, an important distinction between a devise to definite persons or to a class, which is clearly

Devise to a
contingent
class and to

a class upon
a contin-
gency.

and satisfactorily ascertained, at 21, and a devise to such of a class as attain 21 or to those who attain 21. In the latter case "the finding or not finding the legatee depends on his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps v. Ackers* can apply." Such a devise, therefore, will not be vested by a gift over. *Duffield v. Duffield*, 3 Bl. N. S. 260; *Stephen v. Stephen*, Cases temp. Talb. 228; *Festing v. Allen*, 12 M. & W. 279; *Holmes v. Prescott*, 10 Jur. N. S. 507, 33 L. J. Ch. 264, 11 L. T. N. S. 38, 12 W. R. 636, 3 N. R. 559; *Rhodes v. Whitehead*, 2 Dr. & Sm. 532, 13 W. R. 800; *Price v. Hall*, 5 Eq. 399; *Eddel's Trust*, 11 Eq. 559. *Riley v. Garnett*, 3 De G. & S. 629, and *Browne v. Browne*, 3 Sm. & G. 568, will probably not be followed.

But a devise to A. for life, remainder to his children born or to be born in due time after his decease who should live to attain 21, the estates being legal, gives the children estates vested subject to be divested, otherwise a child born within nine months of A.'s death could never take. *Muskett v. Eaton*, 1 Ch. D. 435; see, too, *Doe v. Hopkinson*, 5 Q. B. 223.

An estate
to com-
mence in
certain
events fails
unless the
events
happen.

5. An estate limited to commence in certain specified events will fail altogether unless those exact events happen. Thus a gift, "if A. shall die, living my wife, without leaving a widow or any child, after his death and my wife's" to B., will fail if A. survives the testator's wife, though he may die without leaving a widow or child. *Holmes v. Cradock*, 3 Ves. 317; *Shuldam v. Smith*, 6 Dow. 22.

Where the
contingency
imports no
more than
the deter-
mination of
prior
interests

But in the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent on a condition essential to the determination of the interests previously limited, notwithstanding the words in form

import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interests previously limited." *Maddison v. Chapman*, 4 K. & J. 709, 719, 3 De G. & J. 536; *Webb v. Hearing*, Cro. Jac. 415; *Pearsall v. Simpson*, 15 Ves. 29; *Franks v. Price*, 3 B. 182, 5 Bing. N. C. 37, 6 Sc. 710; *Chellen v. Martin*, 21 W. R. 671; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35.

the estate is vested.

Thus, if the devise is to A. for life remainder to B. for life, and on the decease of B., if A. be dead, to C. in fee, C. takes a vested remainder whether B. survives A. or not. Cases *sup.*; see, too, *Key v. Key*, 4 D. M. & G. 73; *In re Betty Smith's Trusts*, L. R. 1 Eq. 79.

But to admit this construction, the limitation over must involve no incident but what is essential to the determination of the estates previously limited. *Maddison v. Chapman*, 4 K. & J. 709, 3 De G. & J. 536.

Limits of the doctrine.

6. It is now settled that when there is a gift to a person for life, if she so long remains unmarried, or for life until bankruptcy, followed by a gift over in the event of marriage or bankruptcy, the remainder is not contingent, but vested so as to take effect either upon the death or marriage or bankruptcy, as the case may be, of the tenant for life. *Luxford v. Cheeke*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Vent. 199; *Gordon v. Adolphus*, 3 B. P. C. 306; *Foster v. Lord Romney*, 11 East, 594; *Meeds v. Wood*, 19 B. 215; *Browne v. Hammond*, Jo. 210; *Eaton v. Hewitt*, 2 Dr. & S. 184; *Wardroper v. Cutfield*, 12 W. R. 458; *Walpole v. Laslett*, 7 L. T. N. S. 526, 1 N. R. 180; *Etches v. Etches*, 3 Dr. 440.

Estates to arise upon the determination of a prior life estate by marriage or bankruptcy take effect as vested remainders.

In *Pile v. Salter*, 5 Sim. 411, it was held, that the fact of the gift over being in the event of marriage to the tenant for life, together with others, would prevent this construction. This case, however, was not followed in *Underhill v. Roden*, 2 Ch. D. 494.

Pile v. Salter!

But this construction only applies where the ulterior limitation is a remainder, the event upon it which is to take effect being incorporated into the prior limitation for life, and not where the prior life estate is to be cut down in the event of the marriage of the tenant for life. *Sheffield v. Lord Orrery*, 3 Atk. 282.

VESTING OF CHARGES ON LAND.

Legacies charged on land do not vest before they are payable.

The vesting of legacies charged upon real estate is governed by rules derived from the common law.

“If a sum of money be given to a person charged upon real estate, and that person, being an infant, is not to have the legacy immediately, but it is given at 21 or payable at 21, if the child does not attain 21 the legacy is not raisable.” *Parker v. Hodgson*, 1 Dr. & Sm. 568; see *Brown v. Wooler*, 2 Y. & C. C. 134.

Distinction between postponement of payment for the purposes of the estate and of the legatee.

But if the payment is postponed for purposes not referrible to the person of the legatee, but only for the convenience of the estate, as, for instance, in the case of a life tenancy, the legacies vest before the time of payment. *Evans v. Scott*, 1 H. L. 57; *King v. Withers*, Ca. temp. Talb. 116.

It makes no difference whether the legacies subject to a life interest are made payable at 21 or not, though it seems that they will not in any case vest before then. *Remnant v. Hood*, 2 D. F. & J. 396; *Davies v. Huguenin*, 1 H. & M. 730.

Legacy payable upon an event which may never happen is contingent.

And a legacy charged upon land and directed to be paid upon an event which may or may not happen, for instance, when the testator's eldest son should come into possession of a settled estate, will fail if the event does not happen. *Taylor v. Lambert*, 2 Ch. D. 177.

Legacy charged upon real

If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment, and

so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate, but so far as the legacy is payable out of realty the rules with regard to legacies charged upon land apply. *Duke of Chandos v. Talbot*, 2 P. W. 601, 612; *Prowse v. Abingdon*, 1 Atk. 481; *Re Hudsons*, Dru. t. Sugd. 6.

and personal estate follows proportionally the rules applicable to realty and personalty.

VESTING OF BEQUESTS OF PERSONALTY.

The vesting of bequests of personalty is governed by rules derived from the civil law. These rules apply also to realty directed to be converted. *Hart's Trusts*, 3 De G. & J. 195.

Vesting of personalty is governed by the civil law.

I. When there is an express direction as to the period of vesting:

It has been said that the word "vest," being derived from "vestire," naturally refers to vesting in possession, and not to vesting in interest. *Young v. Robertson*, 4 Mac. 314. This is, however contrary to the whole current of English authority, according to which the word "vest" has always been held to refer *prima facie* to vesting in interest or transmissibility, and not vesting in possession or indefeasibility.

Meaning of "vest."

Thus, when there is a direction that the gifts are to be vested at a certain period, the legatees will take no interest till then.

Direction as to vesting is imperative.

Where the interests of legatees are to be vested at twenty-one, a gift over upon death under twenty-one, or upon death before the time of vesting, will not affect the natural meaning of the word. *Glanvil v. Glanvil*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 218; *Griffith v. Blunt*, 4 B. 248; *Rowland v. Tawney*, 26 B. 67; *Re Thatcher's Trust*, ib. 365.

Gift over upon death before the time of vesting will not alter the meaning of the word vests.

In many cases, however, "vested" has been used as equivalent to indefeasible or payable.

When "vested" means "payable."

Gift over
upon death
without
issue before
the time of
vesting.

Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue, vested will mean payable. *Taylor v. Frobisher*, 5 De G. & S. 191.

Shares
treated as
vested be-
fore the
time ap-
pointed.

So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable.

Thus, if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. *Berkeley v. Swinburne*, 16 Sim. 275 ; *Baxter's Trust*, 4 N. R. 131, 10 Jur. N. S. 845.

Similarly, if in the event of any children dying before the time of vesting, leaving children, there is a gift of the share such child would have had if living to his issue ; the direction as to vesting will be referred to payment. *In re Edmondson's Estate*, 5 Eq. 389 ; *Poole v. Bott*, 11 Ha. 33.

Vested and
paid used
inter-
change-
ably.

Or again, it may appear that the testator has used the terms vested and paid interchangeably. *In re Edmondson's Estate*, *sup.*, *Williams v. Haythorne*, 6 Ch. 782 ; *Re Parr's Trust*, 41 L. J. Ch. 170.

Direction
to pay
legacies at
a certain
time.

And when there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet v. Barnet*, 29 B. 239 ; *Simpson v. Peach*, 16 Eq. 209.

Gift to
children -
who sur-
vive the
parent
with a
direction as
to vesting.

When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 B. 556 ; *Williams v. Haythorne*, 6 Ch. 782.

If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and

not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams v. Russell*, 10 Jur. N. S. 168.

A direction that legatees are to be beneficially interested at a certain period, refers only to vesting in possession. *M'Lachlan v. Taitt*, 28 B. 407, 2 D. F. & J. 449.

Beneficial interest.

II. Where there is no direction as to vesting :

1. It is important to distinguish a gift to a contingent class, and a gift to a class upon a contingency ; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as for instance, at twenty-one, might have the effect of vesting the bequest. *Bull v. Pritchard*, 1 Russ. 213 ; *Bree v. Perfect*, 1 Coll. 128 ; *Leake v. Robinson*, 2 Mer. 363 ; *Stead v. Platt*, 18 B. 50 ; *Lloyd v. Lloyd*, 3 K. & J. 20 ; *Thomas v. Wilberforce*, 31 B. 299 ; *Williams v. Haythorne*, 6 Ch. 782 ; see *Re Bulley's Estate*, 11 Jur. N. S. 791, 847 ; *Gotch v. Foster*, 5 Eq. 311.

Gift to a class who attain 21, and to a class at 21.

If the gift is to children who attain twenty-one, and, if but one child, to such child, the contingency of attaining twenty-one will not be imported into the gift to a single child. *Walker v. Mower*, 16 B. 365 ; *Johnson v. Foulds*, 5 Eq. 268.

Contingency not imported into the gift to a single child.

2. When there is a clear gift, an additional direction to pay, when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in presenti, solvendum in futuro*.

Direction as to payment will not postpone vesting when there is a clear gift.

Thus, a gift to A., payable at twenty-one, is vested, and it makes no difference whether the gift precedes or follows the direction for payment, provided a clear immediate gift can be found in the will. *In re Bartholomew*, 1 Mac. & G. 354 ; *Shrimpton v. Shrimpton*, 31 B. 425.

Where the only gift is in the direction to pay, nothing vests till then.

The difficulty in these cases is to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay. See *Shum v. Hobbs*, 3 Dr. 93; *Chaffers v. Abell*, 3 Jur. 577; *Williams v. Clark*, 4 De G. & S. 472; *Merry v. Hill*, 8 Eq. 619.

Direction to accumulate interest till 21 will not affect a gift already vested.

Of course, when there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not affect the vesting. *Stretch v. Watkins*, 1 Mad. 253; *Blease v. Burgh*, 2 B. 226; *Breedon v. Tugman*, 3 M. & K. 289.

In doubtful cases the contingency may be reflected back and *vice versa*.

In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child, upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested interests before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd v. Judd*, 3 Sim. 525; *Merry v. Hill*, 8 Eq. 619.

Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested too. *King v. Isaacson*, 1 Sm. & G. 371.

Paid may mean vested.

And it may appear from the context that the words "to be paid" were meant to refer to vesting and not to payment. *Martineau v. Rogers*, 8 D. M. & G. 328.

Gift to be paid at a time which may never come in the legatee's life is contingent.

3. The time when the legacy is to be paid must, however, be certain; that is to say, it must be certain that the time will come if the legatee lives long enough. No doubt it is uncertain whether a legatee will ever attain the age of twenty-one, for instance, but since he must attain it if he lives, this latter contingency is disregarded.

"When the time annexed to the payment is merely

eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this Court where it has been held that the legacy at all events should be paid." It becomes, in fact, a legacy upon condition, for *dies incertus conditionem in testamento facit*. Thus, a legacy to A. to be paid upon marriage is contingent. *Atkins v. Hiccocks*, 1 Atk. 500; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Morgan v. Morgan*, 4 De G. & Sm. 164; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Corr v. Corr*, I. R. 7 Eq. 397; *Malcolm v. O'Callaghan*, 2 Mad. 849; *Taylor v. Lambert*, 2 Ch. D. 177.

But if interest is given in the meantime, the legacy will be vested, though given upon marriage. *Booth v. Booth*, 4 Ves. 399; *Vize v. Stoney*, 1 D. & War. 337.

But a gift of interest in the meantime makes it vested.

It may be noticed, however, that a legacy given upon marriage may be held upon the context to be given at twenty-one, or upon marriage under twenty-one, as where there was a gift to parents for life, and then to their children if then of age or married, and if any were infants at the death of their parents, then to them at twenty-one, if sons, or on marriage if daughters. *Lang v. Pugh*, 1 Y. & C. C. 719; see *West v. West*, 4 Giff. 198.

Gift upon marriage construed as a gift at 21 or upon marriage under 21.

4. When the only gift is to be found in the direction to pay or divide :

a. If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Bennett's Trust*, 3 K. & J. 280; *Strother v. Dutton*, 1 De G. & J. 675.

Direction to pay after a life interest vests at once.

b. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time.

Direction to pay at 21 will not vest till then.

Thus, a gift to a person at, or if, or as and when he shall attain, or upon attaining, or from and after attaining twenty-one, will not vest till the age is attained. *Hanson v. Graham*, 6 Ves. 239; *Locke v. Lamb*, 4 Eq. 372.

5. There are, however, several circumstances which may have the effect of vesting a gift contingent upon attaining a given age :

Contingent
gift be-
comes
vested by
severance.

a. If the subject of the gift is to be at once separated from the rest of the estate, and vested in trustees to be for the benefit of the legatee, though the interest may not be given in the meantime, but directed to accumulate and go with the capital. *Love v. L'Estrange*, 5 B. P. C. 59; *Saunders v. Vautier*, Cr. & Ph. 240; *Greet v. Greet*, 5 B. 123; *Branstrom v. Wilkinson*, 7 Ves. 420; *Lister v. Bradley*, 1 Ha. 10; *Ingram v. Suckling*, 7 W. R. 386.

By gift of
the inter-
mediate
interest.

b. If the interest upon the legacy is given to the legatee in the meantime till the time of payment arrives. *Hanson v. Graham*, 6 Ves. 239; *Hart's Trusts*, 3 De G. & J. 195; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *Bell v. Cade*, 2 J. & H. 122; *Bolding v. Strugnell*, 24 W. R. 339; 45 L. J. Ch. 208.

(i.) This is the case though the interest may be given subject to charges or annuities. *Lane v. Goudge*, 9 Ves. 225; *Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Ather-ton*, 28 L. J. Ch. 486.

(ii.) Though the interest may be expressed to be given for maintenance. *Hart's Trusts*, 3 De G. & J. 195.

(iii.) It makes no difference, whether the interest is first given up to a given time and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier. *Wadley v. North*, 3 Ves. 364; *Westwood v. Southey*, 2

Sim. N. S. 192; *Bird v. Maybury*, 33 B. 351; *Pearman v. Pearman*, 33 B. 394; *Pearson v. Dolman*, 3 Eq. 315.

It seems doubtful, whether *Spencer v. Wilson*, 16 Eq. 501, is in harmony with the general current of authority, or even with the views expressed in *In re Peek's Trusts*, *ib.* 221, 225.

On the other hand, if the interest is given up to a very advanced age, and the principal not till then, it is more doubtful whether the bequest would be vested. *Batsford v. Kebbel*, 3 Ves. 363.

c. It seems not to be quite clearly settled whether, where there is a discretion to trustees to apply the whole or part of the interest to the maintenance of the legatees, the bequest will be vested. The better opinion now seems to be that it will. *Eccles v. Birkett*, 4 De G. & S. 105; *Rouse's Estate*, 9 Ha. 649; *Fox v. Fox*, 19 Eq. 286; see, however, *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Ashmore's Trusts*, 9 Eq. 99.

Effect of discretion to apply the whole or part of the interest.

It has been suggested, that where the accumulated surplus would go to the same legatees as the interest and capital, the legacy is vested; but where the surplus income is either expressly given over, or would not follow the capital, it is not; so that a gift of residue in such a case would be vested, whereas a particular legacy would not. See *Pearson v. Dolman*, 3 Eq. 315. But *quære* whether this distinction reconciles the cases.

But a discretion either to apply the interest to maintenance or to accumulate it will not vest the legacies: *Vaudry v. Geddes*, 1 R. & M. 203; nor, perhaps, will a discretion to apply the whole or part of the interest, not exceeding a fixed sum, to maintenance: *Merry v. Hill*, 8 Eq. 619; nor will the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy: *Boughton v. Boughton*, 1 H. L. 406; *Watson v. Hayes*, 5 M. & Cr. 125; *Livesey v. Livesey*, 3 Russ. 287.

Cases in which a gift of interest is not sufficient to vest contingent legacies.

And the gift of a sum for maintenance out of the personal estate not exceeding the income of the legacies will have no effect upon vesting. *Wynch v. Wynch*, 1 Cox, 433; *Rudge v. Winnall*, 12 B. 357.

And a discretionary power given to trustees to apply the income for the benefit of the legatees, to the exclusion of any one or more of them, will not vest their shares. *In re Barnshaw's Trust*, 15 W. R. 378.

Effect of a gift of interest for a portion of the period before vesting.

d. Where interest is given only for a portion of the period before the time fixed for payment, if, for instance, legacies are given at twenty-six, with interest for maintenance during minority, it is doubtful whether the gift will be vested; probably it will not without more. See the remarks in *Pearson v. Dolman*, 3 Eq. 315. In *Davies v. Fisher*, 5 B. 201; *Harrison v. Grimwood*, 12 B. 192; *Tatham v. Vernon*, 29 B. 604, there were other circumstances. And see *Hunter's Trusts*, L. R. 1 Eq. 295.

It may be noticed, that minority properly means the period before the attainment of twenty-one; though, if there is an intention expressed to that effect, it may mean the whole period during which the testator has kept the legatee out of the property. *Milroy v. Milroy*, 14 Sim. 48; *Maddison v. Chapman*, 4 K. & J. 709, 3 De G. & J. 536; *Fraser v. Fraser*, 1 N. R. 430.

Gift of interest itself contingent.

e. Of course, where the interest is not given in the meantime, but is itself given at the same time as the principal, the gift does not vest. *Knight v. Knight*, 2 S. & St. 490; *Locke v. Lamb*, 4 Eq. 372.

Distinction between gift of interest upon a legacy to an individual and upon an aggregate fund given to a class.

f. In some cases a distinction has been drawn between the gift of a sum to each of several legatees at twenty-one, with a gift of interest in the meantime, and the gift of an aggregate fund to a class as they respectively attain twenty-one, with a direction that the interest is to be applied for their maintenance in the meantime; in which latter case it has been held that, as the fund is to be kept together,

and the whole interest applied for maintenance, nothing will vest before twenty-one. See *Pulsford v. Hunter*, 3 B. C. C. 416; *Barker v. Lea*, T. & R. 413; *Re Ashmore's Trusts*, 9 Eq. 99. But the point is a very doubtful one.

g. It seems a gift of personalty to A. till B. attains twenty-one, and then to B., will not give B. a vested interest: *Sullivan v. Edgell*, 23 W. R. 722; though it will where there is anything to show that A. takes in trust for B. on the principle already stated, *ante*, p. 276: *Lane v. Goudge*, 9 Ves. 225.

Whether gift of personalty to A. till B. attains 21, and then to B., is vested.

h. An argument in favour of vesting has sometimes been based upon a power to make advances. *Vivian v. Mills*, 1 B. 315; *Harrison v. Grimwood*, 12 B. 192; *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713; see *Malden v. Maine*, 2 Jur. N. S. 206.

Arguments in favour of vesting.

And the fact that the gift is residuary is also, it is said, in favour of vesting. *Booth v. Booth*, 4 Ves. 399; see *ante*, p. 277.

6. Effect of a gift over upon vesting.

a. It seems a mere gift over upon death under twenty-one will not have the effect of vesting a prior gift contingent upon attaining twenty-one, though the point is doubtful: *Ridgway v. Ridgway*, 4 De G. & S. 271; *Davies v. Fisher*, 5 B. 201; in both which cases there were other circumstances which alone would have been sufficient to vest the gift; and see *per* Sir J. Leach in *Bland v. Williams*, 3 M. & K. 411. The remarks, however, of Sir John Leach seem to be based on the theory that a gift over under twenty-one, the prior gift being at twenty-one, shows that the prior gift was not meant to be vested. The truer doctrine appears to be, that a gift over upon death under twenty-one neither shows that the prior gift was meant to be contingent, nor has the effect of making it vested. See *Re Baxter's Trusts*, 4 N. R. 131; *Malcolm v. O'Callaghan*, 2 Mad. 349; *In re Payne*, 25 B. 556.

A mere gift over upon death before the time of vesting has no effect.

A clause of accruer is an argument for vesting.

b. But where the gift is to a class at twenty-one, followed by a clause of accruer giving the interests of those dying under twenty-one to the other members of the class (a direction which would be useless if the shares are contingent till twenty-one), there is a strong argument in favour of vesting. *In re Edmonson's Estate*, 5 Eq. 389.

Gift over upon death without issue.

c. It seems, that a mere gift over upon the death of any of the legatees without issue will not vest contingent legacies. *Barker v. Lea*, T. & R. 413.

Gift over upon death without issue before the time of vesting.

d. But a gift over upon death under twenty-one, and without issue, will vest a prior gift at twenty-one.

The testator seems to imply that the legacy is to go over not upon failure to attain that age, but only in the events mentioned, and the attainment of the given age is therefore not a condition precedent to vesting. *Harrison v. Grimwood*, 12 B. 192; *Bland v. Williams*, 3 M. & K. 411; *Murkin v. Phillipson*, *ib.* 257; *Thomson's Trusts*, 11 Eq. 146.

Effect of gift over upon death of the parent without issue upon contingent bequests to the children.

e. But if the gift is to A. for life, then to her children at twenty-one, and if A. dies without issue, or without leaving issue over, the gift over has no effect upon the vesting, since it may have been intended to provide for the death of all the children before the tenant for life. *Walker v. Mower*, 16 B. 365; *Wrangham's Trusts*, 1 Dr. & Sm. 358; *Kidman v. Kidman*, 40 L. J. Ch. 359; see *Wetherall v. Wetherall*, 1 D. J. & S. 134.

On the other hand, if the gift is to children living at the death of tenant for life, as they attain twenty-one, a gift over on the death of the tenant for life without leaving issue will afford a strong argument in favour of vesting, since it is ineffectual if the children survive the parent and die under twenty-one. *Bree v. Perfect*, 1 Coll. 128.

Gift to a class when the youngest attains 21.

7. When the gift is to a class when the youngest attains twenty-one, it is clear that all who attain twenty-one will take vested interests. *Leeming v. Sherratt*, 2 Ha. 14; *Parker*

v. *Sowerby*, 1 Dr. 488 ; see 4 D. M. & G. 321 ; *Smith's Will*, 20 B. 197 ; see *Sansbury v. Read*, 12 Ves. 75 ; *Ford v. Rawlins*, 1 S. & St. 329 ; *In re Hunter's Trust*, L. R. 1 Eq. 295.

It has, however, been said that those who die under twenty-one will not take vested interests, see the cases *supra cit.* ; but in them the exact point does not appear to have arisen for decision, and to import the contingency of attaining twenty-one into the constitution of the class seems contrary to principle.

Whether those dying under 21 are excluded.

At any rate, in such a case, if the gift is not to a class, but to individuals named, they take vested interests. *Cooper v. Cooper*, 29 B. 229.

So, too, if the income is given to the class till the youngest attains twenty-one, and then the principal, they all take vested interests. *Grove's Trusts*, 3 Giff. 575 ; *Re Andrew*, 8 L. J. Notes of Cases 174 ; see *Boulton v. Pilcher*, 29 B. 633.

And if there is a clear gift to the class, a direction that it is to be divided when the youngest attains twenty-one will not postpone the vesting. *Knox v. Wells*, 2 H. & M. 674 ; *Hilliard v. Fulford*, 28 L. T. N. S. 892, 42 L. J. Ch. 624 ; see *Blasson v. Blasson*, 2 D. J. & S. 665.

III. Gifts to children contingent upon surviving their parents.

1. In many cases where a gift to children has been made contingent upon their surviving their parents, the courts have laid hold of slight ambiguities to give them vested interests at birth. Most of the cases upon this subject have arisen on marriage settlements where there is a strong presumption of intention to provide for children generally, whereas gifts by will are mere bounty. *Farrer v. Barker*, 9 Ha. 743 ; but see *Jackson v. Dover*, 2 H. & M. 209.

It is, however, now clearly settled that in marriage Words of

contingency must have their full force in settlements as in wills.

settlements, as in wills, words of contingency must have their full force, and the court will "lean" in favour of vesting only in cases of doubtful construction. *Whatford v. Moore*, 3 M. & Cr. 289; *Jeyes v. Savage*, 10 Ch. 555.

Gifts to children living at their parents' death.

Thus a gift, after life interests to parents, to the children living at their decease, or if there are any children then living to *such* children, only goes to those who survive their parents; *à fortiori* if provision is made for the issue of children who die before their parents leaving issue. *Jeyes v. Savage*, *supra*; *In re Deighton's Settled Estates*, 2 Ch. D. 783.

Force of the word "such."

The fact that the word "such" is sometimes omitted in some of the limitations will not cause its rejection, if it occurs in the limitation under which the children take. *Whatford v. Moore*, 3 M. & C. 270; *Skipper v. King*, 12 B. 29; *Wilson v. Mount*, 19 B. 292.

It may be rejected if inaccurately or inconsistently used.

But, it would seem, it may be rejected, if it appears on the whole will that it is incorrectly used. *Howgrave v. Cartier*, 3 V. & B. 79.

And if the parent has power to pay over their shares to *such* children in his lifetime, the contingency of surviving the parent will be rejected, since the testator cannot have meant shares paid to children who die before their parents to be returned. *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713.

Gift contingent upon surviving a parent explained by context.

2. And there may be sufficient evidence of intention to show that children dying before their parents were to take vested interests, though the original gift is contingent upon their surviving them.

Thus, if there is a direction that children are to take vested interests at twenty-one, or upon marriage, "though such respective times may happen before the parents' decease," the prior gift is controlled. *Dalton v. Hill*, 10 W. R. 396.

The same is the case, if the shares of the children are expressly referred to by the testator as payable in their parents' lifetime, and directed not to be paid till their deaths. *Jackson v. Dover*, 2 H. & M. 209.

But the mere fact, that the interests are to be vested at twenty-one, but not to be transferred till after the parents' death, will not give children dying before their parents vested interests, the word vested being read as equivalent to payable. *Williams v. Haythorne*, 6 Ch. 782.

But if the direction is that children, who attain twenty-one, or die under that age leaving issue, are to take vested interests, the direction will control the contingency, and children who attain twenty-one and die before their parents will take vested interests. *Williams v. Russell*, 10 Jur. N. S. 168.

3. So, too, children will take vested interests before their parents' death, if the property is given over in events which do not include the death of some of the children over twenty-one in their parents' lifetime, so that in that event the property would be undisposed of. *Perfect v. Lord Curzon*, 5 Mad. 442; *Torres v. Franco*, 1 R. & M. 649; *Swallow v. Binns*, 1 K. & J. 417; *Dixon v. Barkshire*, 34 B. 537.

Gift to children who survive their parents may be vested by the effect of the gift over.

4. In cases, where there is a gift to a class of children, if any children survive their parents, it is clear, that unless some children survive the parents the gift never arises. *Hotchkin v. Humfrey*, 1 Mad. 65; *Fitzgerald v. Field*, 1 Russ. 430.

Gift to a class upon a contingency.

But the contingency will not, without express words, be imported into the constitution of the class, so that if the contingency happens all members of the class will take whether they survive the contingency or not; thus, if there is a gift to A. for life, and then if he die leaving a child, to his children as tenants in common; if one child survives A., all his children, whether they survive him or

The contingency is not to be imported into the constitution of the class.

not, will take. *Bradley v. Barlow*, 5 Ha. 589; *Boulton v. Beard*, 3 D. M. & G. 608; *M'Lachlan v. Taitt*, 28 B. 407, 2 D. F. & J. 449; *Re Gratwicke*, 35 B. 315; *Re Orlebar's Settlement*, 20 Eq. 711; *Goddard's Trusts*, I. R. 5 Eq. 14; see *Blasson v. Blasson*, 2 D. J. & S. 665.

Similarly, powers of raising different sums according to the number of children a man may have, will not be limited to mean the number of children capable of taking. *Knapp v. Knapp*, 12 Eq. 238.

Effect of gift over if no one of the class survive the contingency.

But if the gift is to the children of A. if he leaves any him surviving, and there is a gift over if A. leaves no children him surviving, it would seem only children surviving A. would take. *Winn v. Fenwick*, 11 B. 438; *Wilson v. Mount*, 2 W. R. 448, 19 B. 292; *Stevens v. Pile*, 30 B. 284; *Stolworthy v. Sancroft*, 12 W. R. 635.

The word "such" will not be supplied so as to make a gift contingent.

Of course, if the gift is in the event of there being any children surviving at a particular time to "such" children, only those who survive the contingency can take, but the court will not supply the word "such" if it does not occur in the limitation under which the children take, so as to cut down the class, though the omission may be accidental. *Woodcock v. Duke of Dorset*, 3 B. C. C. 569, corrected in 3 V. & B. 83; *King v. Hake*, 9 Ves. 439; *Stolworthy v. Sancroft*, 12 W. R. 635.

Contingency reflected back.

If there is a gift in remainder or upon a contingency to a class, which would give the members of the class vested interests immediately, or upon the happening of the contingency, and there is a direction that if there be but one child living at the period of distribution, or when the contingency happens, the whole is to go to that child, the contingency of being then living, has in several cases been reflected back into the constitution of the original class. *Smith v. Vaughan*, 8 Vin. Ab. 381, tit. Devise (Z. c.) pl. 32; *Spencer v. Bullock*, 2 Ves. jun. 687;

Madden v. Ikin, 2 Dr. & S. 207; *Lewis v. Templer*, 33 B. 625; *Cooper v. Macdonald*, 16 Eq. 258.

The point cannot, however, be said to be settled beyond dispute in the face of *Kimberley v. Tew*, 4 D. & War. 139.

5. When there is a gift after prior interests to persons "then living," the word then refers most naturally to the last antecedent; thus, in the case of a gift to A. for life, remainder to B. for life, remainder to a class "then living," the word then refers to B.'s death, whether he dies before A. or not. *Archer v. Jegon*, 8 Sim. 446; *Wollaston's Settlement*, 27 B. 642; *Olney v. Bates*, 3 Dr. 319; *Heasman v. Pearse*, 7 Ch. 661.

To what
the word
"then"
refers.

On the other hand, if the object of the testator is not to limit successive interests, but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word then refers most naturally to the period of enjoyment. *Harvey v. Harvey*, 8 Jur. 949; *Hetherington v. Oakman*, 2 Y. & C. C. 299; *Gill v. Barrett*, 29 B. 373; see, too, *Heasman v. Pearse*, 7 Ch. 275.

It may be noticed that in a gift to several persons nominatim and their children then living, the contingency of being then living will not be applied to the parents as well as the children, unless there is something to show that parents and children were to form one homogeneous class. *Burrell v. Baskerfield*, 11 B. 255; *Cormack v. Copous*, 17 B. 397; *Turner v. Hudson*, 10 B. 222.

For cases, in which a stirpital construction may be given to the words "then living," see *Cooper v. Macdonald*, 16 Eq. 258; and see *Survivors*.

Stirpital
construc-
tion of the
words
"then
living."

IV. Vesting of interests under powers of appointment.

Where there is a gift to certain persons as A. shall appoint, or a power to appoint certain property, and a gift

From what
time
persons

taking
under a
power
take vested
interests.

in default of appointment, the persons to take in default of appointment take vested interests at the testator's death, subject to be divested by the exercise of the power. *Doe d. Willis v. Martin*, 4 T. R. 39, Fearne, C. R. 225.

Thus a gift to children as A. shall by will appoint vests in all the children, but an appointment of the whole in favour of an only surviving child is good. *Woodcock v. Renneck*, 4 B. 190, 1 Ph. 72.

If, however, the power is exercised in favour of the same persons as would have taken in default of appointment, a question arises, whether the appointees are to be considered as taking under the original will or under the power.

It seems clear, that where the will authorises an appointment among persons, who would not all take in default of appointment, the appointees take under the exercise of the power: *Lee v. Olding*, 29 L. J. Ch. 580, 2 Jur. N. S. 850; *Vizard's Trusts*, L. R. 1 Ch. 588; and even where the power is merely distributive, so that the persons to take under the appointment and in default are the same, they take, nevertheless, under the exercise of the power, and not under the document creating it. *De Serre v. Clarke*. 18 Eq. 587.

CHAPTER XXIV.

PERPETUITY AND ACCUMULATION.

A LIMITATION by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation, or of any other person, allowance for gestation being made only in those cases where it actually exists. *Cadell v. Palmer*, 1 Cl. & F. 872.

Rule
against
remoteness
stated.

The object of the rule is to limit the inalienability of property, it does not therefore apply, where money given to charity is given over upon a remote event, the effect of the gift over being to make inalienable property alienable. *Christ's Hospital v. Grainger*, 16 Sim. 83, 1 Mac. & G. 460.

Gift over of
property
given to
charity is
good how-
ever re-
mote.

It has been much debated, whether the rule against perpetuity applies to legal remainders, but it appears to be now settled that it does not. See *Cole v. Sewell*, 4 D. & War. 1, 2 H. L. 186.

The rule
does not
apply to
legal re-
mainders.

On the other hand, though remainders are not subject to the doctrine of perpetuity, they are controlled by an analogous doctrine, that no estate by way of remainder can be limited to the unborn son of an unborn person, whether expressly limited to take effect within the limits of perpetuity or not, so that, for instance, in a limitation to A. an unmarried person for life, remainder to

Legal re-
mainder to
unborn son
of unborn
person
void.

his first son for life, remainder to the first son of the first son of A., born in A.'s life, or within twenty-one years afterwards, in fee, the ultimate remainder in fee would be bad, though clearly within the limits of perpetuity. 2 Rep. 51 *a*, 10 Rep. 50 *b*.; *Monypenny v. Dering*, 2 D. M. & G. 145.

The practical result of this rule is, that legal remainders are, in fact, confined within narrower limits as regards perpetuity than other limitations, since there seems no reason to doubt, that the limitation above-mentioned would be good in the case of executory limitations.

It must be noticed, however, that, though the balance of authority is in favour of the rules above laid down, there seems to be no decision upon the precise point, though *Cole v. Sewell*, *supra*, has been sometimes supposed to be such a decision.

Whether
Cole v.
Sewell is a
direct
decision on
the ques-
tion
whether a
legal re-
mainder
can be too
remote.

In that case, after limitations in tail in favour of particular lines of issue, there was a gift over upon a general failure of issue, and it was held that the gift over was good, being a legal remainder, and therefore barrable as long as it subsisted. The decision, it is said, must have proceeded on the exact ground, that the remainder was not void for perpetuity because it was a legal remainder, since the rule is that a limitation other than a legal remainder, if limited upon an event too remote, is bad, even though the previous estates may be in tail, unless the event must take place before the determination of the prior estates, or in other words, unless the limitation over is always barrable; and in *Cole v. Sewell* there might have been a failure of the particular lines of issue before a failure of issue generally, so that if the remainder had been equitable it would have been bad.

But, it may very well be said, that the decision in

Cole v. Sewell, in the House of Lords, was that the remainder was good, not because it was a legal remainder, but because, being a legal remainder, it was always barrable as long as it subsisted.

The doctrine of perpetuity was excluded not because the remainder was legal but because it was barrable.

It does not follow that it would have been good if the prior estates had not been estates tail.

The fact that legal contingent remainders after an estate tail must be barrable as long as they are contingent, since they fail by the failure of the prior estate, is in itself no argument for saying that they are good because they are remainders, and not because they are always barrable.

On the other hand, it seems that Fearne considered that the doctrine of perpetuity was applicable to remainders. "Any limitation in future," he remarks, "or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation." See *Cont. Rem.* 501 (ed. 10th, 1844).

Opinion of
Fearne.

It is true he goes on to quote as an instance a limitation of lands in succession first to a person in esse, and after his decease to his unborn children, and afterwards to the children of such unborn children, which is admitted to be void by those who deny that the doctrine of perpetuity applies to remainders; but he seems to have meant that such a limitation would be void for perpetuity and not as a possibility upon a possibility, so that if limited to take effect within the bounds of perpetuity it would be valid.

Lord Hatherley, too, in *Cattlin v. Brown*, 11 H. 377, lays down the same principle; and the opinion of Mr.

Of Lord
Hatherley
and Jar-
man.

Jarman, though not of his editors, is to the same effect. See 3rd ed., vol. i., p. 232.

Authority
for the se-
cond branch
of the rule.

On the other hand, the authority for the second branch of the rule, namely, that a limitation by way of remainder to the unborn son of an unborn person, is bad in itself, independently of remoteness, is entirely unsupported by decision, and is in fact a survival of the old doctrine, that there cannot be a possibility upon a possibility, which, if it ever existed (see *Duke of Norfolk's Case*, 3 Ch. C. 1, Lord Northington's judgment), has long since been exploded for all other purposes; and the numerous dicta, which lay down that a devise by way of a remainder to the unborn son of an unborn person is void, might very well be understood as laying down no more, than that such a limitation is void because it is too remote, and not because it is to the unborn son of an unborn son.

As Lord St. Leonards points out, "A limitation like this is clearly void by reason of its tendency to a perpetuity, independently of the technical objection of its being a possibility upon a possibility, which probably means the same thing." Powers, p. 398. If it does mean the same thing, a devise by way of remainder to the son of an unborn son if born within the life of his grandfather, or within twenty-one years afterwards, being within the limits of perpetuity, would be good.

Argument
of Mr.
Joshua
Williams.

Mr. Joshua Williams argues against the validity of such limitations, because no conveyancer has ever embodied them in a settlement. But the mere fact that their validity is doubtful, would be sufficient to deter a careful conveyancer, much more the Court of Chancery, from adopting them in a settlement. To insert them would, in fact, be to bring about the decision of a speculative point of law at the expense of a client, which is what a conveyancer exists to prevent. Again, there seems no

reason to suppose, that such limitations are invalid with regard to personalty, to which the doctrine of a possibility upon a possibility never had any application, nor does Mr. Williams extend it to personalty. (See *Personal Property*, p. 268.) Yet such a settlement appears to be no more common in the case of personalty than of realty. And, indeed, it is doubtful whether settlors or testators desiring to tie up their property, would prefer the limitations here discussed to those ordinarily introduced into settlements, since their effect would be, not to tie up property one day longer than can be done by other means, but to favour more remote at the expense of less remote descendants.

If, then, amid this conflict of authority, it were possible to consider the question as one of first impression, the main arguments in favour of extending the rule against perpetuities to remainders, would seem to be, in the first place, the advantage of one uniform rule as applicable to every form of limitation, and in the second place, that it would no longer be necessary to put in force the old doctrine against a possibility upon a possibility, which is at the best of doubtful validity.

Arguments
in favour of
extending
the rule
against re-
moteness to
legal re-
mainders.

It is not unusual to find other arguments brought forward in favour of extending the rule of perpetuity to remainders, but it may be doubted whether they are entitled to great weight.

Arguments
of Mr.
Tudor.

Lord St. Leonards, in *Cole v. Sewell*, 4 Dr. & War. 1, says, "It is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question, for the given remainder is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then by the rule of law, unless the event upon which the contingency depends happen, so that the remainder

may vest *eo instanti* the preceding limitation determines, it can never take effect at all," p. 28.

To this Mr. Tudor replies, that this reasoning does not apply when the estates are equitable, or when there are trustees to preserve contingent remainder. Tudor, Leading Cases, 409.

Equitable estates, however, are not, properly speaking, remainders at all, but in the nature of executory interests, and as such subject to the ordinary rule against perpetuity.

And, on the other hand, it would be difficult to frame a limitation to trustees to preserve contingent remainders, followed by a limitation which should be at once a good legal remainder, and obnoxious on account of remoteness. The trustees could not take a fee, nor could they take a determinable fee, for no remainder could then be limited. *Seymor's Case*, 10 Co. 95, b.; Tudor, Leading Cases, 616. They must, therefore, either take in tail or for life. No doubt, in the former case, property might frequently be tied up for a very considerable time, since the trustees would have no motive for barring their estate tail; but even if they did not, the remainder might still fail by failure of issue of the trustees at any time before the remainder could take effect.

Of course, if the trustees take for life only, since the legal remainder must take effect within lives in being or not at all, there could be no objection on the score of remoteness.

The rule is to be applied to the state of things existing at the testator's death.

In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, is to be looked at. *Vanderplank v. King*, 8 Ha. 17; *Cattlin v. Brown*, 11 Ha. 382; *Peard v. Keke-wich*, 15 B. 173.

Possible not actual events are

But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might pos-

sibly not have vested within the proper time, it will not be good, because, as a matter of fact, it did so vest. *Lord Dungannon v. Smith*, 12 Cl. & F. 546.

The fact that a woman is past the age of child-bearing at the date of the will or death, is not to be considered, and the chance of such a woman having children is a possible event for the purposes of determining whether a gift is void for perpetuity or not. *Jee v. Audley*, 1 Cox, 324; *In re Sayer's Trusts*, 6 Eq. 319.

Any gift not being charitable, the object of which is to tie up property for an indefinite time, is void; as, for instance, a devise of land to the trustees of the Penzance Library, to hold to them and their successors for ever, for the maintenance and support of the library. *Carne v. Long*, 2 D. F. & J. 75; *Thompson v. Shakespear*, 1 D. F. & J. 399; *Neo v. Neo*, L. R. 6 P. C. 381; *In re Clark's Trust*, 1 Ch. D. 497.

So, too, a restriction upon alienation beyond lives in being and twenty-one years after, is bad. *Armitage v. Coates*, 35 B. 1.

No questions with regard to remoteness can arise on limitations subsequent to an estate tail, provided the subsequent limitations must take effect, either during the existence of the estate tail or at the moment of its determination. *Cole v. Sewell*, 4 Dr. & War. 1, 2 H. L. 186; *Doe d. Winter v. Perratt*, 9 Cl. & F. 606; *Heasman v. Pearse*, 7 Ch. 275.

The foundation of this rule is, that if the subsequent limitations are such, that they must take effect during the existence of the estate tail, or at the moment of its determination, or not at all, they are always barrable, and therefore do not tend to restrain the free disposal of property.

And the converse follows, that, if the subsequent limitations are not always barrable, they will be subject to the rules of remoteness. The rule is sometimes laid down

to be considered.

That a woman past child-bearing may have children is a possible event within the rule.

Gift tending to tie up property for an indefinite time is void.

Whether limitations subsequent to an estate tail can be too remote.

The test is that they must be barrable as long as they subsist.

absolutely, that no limitations after estates tail are too remote, but it can only be accepted with the qualification above laid down. Otherwise, by means of limitations of equitable remainders which do not fail by failure of the prior estates, and are not barrable after the estate tail has determined property, might possibly be tied up for an almost indefinite time.

There seems to be no express decision on the point, but the rule as above laid down is involved in the decisions in *Lady Lanesborough v. Fox*, Ca. temp. Talbot, 262; *Tregonwell v. Sydenham*, 3 Dow. 194.

The trusts of a term precedent to an estate tail may be void for remoteness.

Where interests are precedent to estates tail, they are, of course, not barrable, and the ordinary rules of perpetuity apply. Therefore, where a term precedent to estates tail is limited to trustees, upon trusts which are too remote, the trusts are void. *Case v. Drosier*, 2 Kee. 704, 5 M. & Cr. 246.

And where the term is precedent this will be the case, even though the event in which the trusts are to be executed would become impossible if the subsequent estates tail were barred. *Sykes v. Sykes*, 13 Eq. 56.

Concurrent terms.

Similarly, powers not strictly precedent to, but concurrent with, an estate tail, for instance, a power to accumulate, during the minorities of any persons entitled under the limitations of the will, whether the accumulations are expressly carried over or not, or to enter and manage the property, is void. *Marshall v. Holloway*, 2 Sw. 432; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Browne v. Stoughton*, 14 Sim. 369; *Turvin v. Newcome*, 3 K. & J. 16; *Floyer v. Banks*, 8 Eq. 114.

Trust for accumulation to pay debts is good.

But a trust for accumulation for the purpose of paying off debts or incumbrances upon the estate of the testator is valid. *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65; *Bateman v. Hotchkin*, 10 B. 426; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363.

And a direction to accumulate a fund till it reaches a certain amount, and then to apply it for the benefit of certain named persons for their lives, and the life of the survivor, is not void for perpetuity, if the fund, whether it has reached the amount directed or not, is to be divided at the death of the survivor. *Oddie v. Brown*, 4 De G. & J. 179.

A direction to accumulate till a fund reaches a certain sum.

No doubt powers of sale and leasing would be void, if the testator clearly shows that he intended them to subsist, or to arise beyond the limits of perpetuity; see *Ware v. Polhill*, 11 Ves. 257; *Hale v. Pew*, 25 B. 335.

Power of sale and leasing.

But powers of sale, whether collateral or subsequent, though given in general terms in a settlement containing limitations for life, with remainders in fee or in tail, with an ultimate remainder in fee, are good, the power being spent as soon as the object of the settlement is at an end by the absolute interest vesting in possession, or being liable to be defeated by a disentailing deed. *Biddle v. Perkins*, 4 Sim. 135; *Nelson v. Callow*, 15 Sim. 353; *Waring v. Coventry*, 1 M. & K. 249; *Lantsbery v. Collier*, 2 K. & J. 709; *Taite v. Swinstead*, 26 B. 525.

The vesting of property may be postponed for any length of time, provided it must ultimately vest, if at all, in persons born at the death of the testator, and living at the time of vesting, since in such a case it must vest absolutely within lives in being. *Lachlan v. Reynolds*, 9 Ha. 796.

Gift to persons who must be living at the testator's death and at the time of vesting, cannot be too remote.

But the gift is void for perpetuity, though it must vest in persons born within lives in being at the testator's death, and living when the event happens, if it may not so vest within lives in being and twenty-one years afterwards. *Jee v. Audley*, 1 Cox, 324; see *Garland v. Brown*, 10 L. T. N. S. 292.

It has been held, that in a gift to A. and B. for life, remainder to their issue for life, remainder to the execu-

Avern v. Lloyd.

tors and administrators of A. and B. or their issue, who should happen to be such survivor, the last remainder is not void for perpetuity. *Avern v. Lloyd*, 5 Eq. 383.

It seems clear that if the gift in remainder were construed to be to such one of the class composed of A. and B., and the issue living at their respective deaths, as should be the longest liver, it would be void for remoteness, since, though the class to take would be fixed within lives in being, the absolute vesting might be postponed till the death of all the issue but one.

On the other hand, if the gift could be construed to be to the issue living at the death of A. and B., or to the survivor of A. and B., if there are no issue to take, it would be good, since it must vest absolutely on the death of A. and B. But the case is doubtful. See *Stuart v. Cockerell*, 7 Eq. 363.

Gift for life to unborn children of a tenant for life is good.

Whether life estates following upon life estates of unborn persons are good.

A limitation for life to the unborn children of a tenant for life is good. *Avern v. Lloyd*, 5 Eq. 383; *Stuart v. Cockerell*, 7 Eq. 363; see 5 Ch. 713.

And limitations following upon the life estates of unborn persons are good, if kept within the limits of perpetuity. *Ib. Evans v. Walker* 3 Ch. D. 211.

It has been said that a limitation to the unborn children of a tenant for life, and the survivors and survivor of them, during the life of the longest liver, would be good; since the persons in whom the fee must vest, *i. e.*, all the children of the tenant for life, and the heir at law, would be ascertained at the death of the tenant for life.

It may be doubted, however, whether this is any test. See *Garland v. Brown*, 10 L. T. N. S. 292, *ante*, p. 295. At any rate, if grandchildren are substituted for children dying, leaving children, the limitation would be void for remoteness, since the class to convey the fee could not be ascertained till the death of the children of the tenant for life. *Gooch v. Gooch*, 14 B. 565, 3 D. M. & G. 366.

Limitations following upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not. *Procter v. Bishop of Bath and Wells*, 2 H. Bl. 358; *Brudenell v. Elwes*, 1 East, 442; *Beard v. Westcott*, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25; *Thatcher's Trust*, 26 B. 365.

Limitations dependent on void limitations are themselves void.

On the other hand, where the limitations are not subsequent but alternative, one of them being valid and the other too remote, effect will be given to the valid alternative, if the events on which it is limited occur. *Longhead v. Phelps*, 2 W. Bl. 704; *Crompe v. Barrow*, 4 Ves. 681; *Monypenny v. Dering*, 2 D. M. & G. 145; *Doe v. Challis*, 18 Q. B. 244, 7 H. L. 531.

Alternate contingent limitations.

Where there is a gift to a class, any members of whom may have to be ascertained beyond the limits of perpetuity, the whole gift is void. *Leake v. Robinson*, 2 Mer. 863; *Gooch v. Gooch*, 14 B. 565, 3 D. M. & G. 366; *Merlin v. Blagrove*, 25 B. 125; *Stuart v. Cockerell*, 7 Eq. 363, 5 Ch. 713.

Gift to a class to be ascertained beyond the limits of perpetuity is void.

Similarly, where there is a gift after the death of an unborn tenant for life to the children and grandchildren of a living person, the gift is void for remoteness, the children and grandchildren being intended to form one class. *Stuart v. Cockerell*, 7 Eq. 363, 5 Ch. 713.

But if the remoter issue are to take substitutionally, the gift to the original class will be good, though the substitutional gifts may be void for remoteness. *Baldwin v. Rogers*, 3 D. M. & G. 649; *Packer v. Scott*, 33 B. 511.

The rule against perpetuity applies where the gift is to a remote class, and a named person as tenants in common, the shares not being ascertainable within the proper limits. *Porter v. Fox*, 6 Sim. 485.

Whether a gift to an individual and a remote class is void.

Perhaps, however, it would not apply to a similar gift in joint tenancy. 1 Jarman, 252.

On the other hand, where particular sums are given to

Distinction between

gift of a fund to a class and gift of a sum to each member of a class.

Cases where it is possible to sever valid and remote shares.

each of the members of a class, the gift is good as to those members who are within the limits of perpetuity. *Storrs v. Benbow*, 2 M. & K. 46, 3 D. M. & G. 390; *Wilkinson v. Duncan*, 30 B. 111.

This principle has been extended to cases where, though the gift is in terms to a class, the effect of it is to give definite sums, ascertained at the determination of lives in being, to each of several classes, some of which are within and some without the line of perpetuity; for instance, if the gift is to A. for life, remainder to A.'s children for life, and the share of each child to go to his children, since the share of each of A.'s children is ascertained at A.'s death, the effect is to give a definite sum to each group of A.'s grandchildren, and the gift is good as regards those grandchildren whose parents were born in the testator's life-time. *Griffith v. Pownall*, 13 Sim. 393; *Cattlin v. Brown*, 11 Ha. 372; *Knapping v. Tomlinson*, 12 W. R. 784, 10 Jur. N. S. 626.

And the principle is the same, where the gift is to A. for life, then to A.'s children living at his death, who should attain twenty-one, the shares of each daughter to be settled on her for life, remainder to her children. In such a case the direction to settle was held good with regard to a child of A. in esse at the testator's death. *Wilson v. Wilson*, 4 Jur. N. S. 1076, 28 L. J. Ch. 95.

And, apparently, if the gift were directly to the grandchildren instead of through the direction to settle, the construction would be the same. *Greenwood v. Roberts*, 15 B. 92, which at first sight appears to decide the contrary, is explained by the M. R., in *Webster v. Boddington*, 26 B. 128, to have been decided on a different principle. Whether the principle was rightly applied, *quære*.

But if the share given to grandchildren is contingent upon events, which may happen beyond the limits of perpetuity, and the share may never become vested, in which

event the shares taken by the other stirpes would be increased, then the shares of each stirps would not be ascertainable within the proper limits, and the whole will fail; for instance, if the gift is to A. for life, then to the children of A., and the children of such children who attain twenty-one, the children to take a parent's share. *Webster v. Boddington*, 26 B. 128; *Smith v. Smith*, 5 Ch. 342; see *Salmon v. Salmon*, 29 B. 27. *In re Mosley's Trusts*, 11 Eq. 499, may probably be considered as overruled by *Smith v. Smith*; see *Hall v. Hall*, W. N. 1876, July 29, p. 232.

Where there is a gift to a person by some particular description, the gift will be void, unless it is clear that there must be some person answering the description within the limits of perpetuity. Thus, a trust to convey to such person as for the time being would take by descent as heir male of the body of the testator's grandson, when some such person should attain the age of twenty-one, is void. *Lord Dungannon v. Smith*, 12 Cl. & F. 546; *Ibbetson v. Ibbetson*, 10 Sim. 495, 5 M. & Cr. 26; *Wainman v. Field*, Kay, 507.

Gift to a person satisfying a particular description is void unless there must be some such person within the limits of perpetuity.

How far the words, "as far as the rules of law and equity permit," would restrain the gift to such persons as satisfy the description within the limits of perpetuity, seems not clearly settled.

Effect of the words "as far as the rules of law and equity permit."

Where there was a gift to the person who should from time to time be Lord Vere, it being the testator's will, that the goods should be held with the title of the family, as far as the rules of law and equity permit, the gift was held void for perpetuity. But there the qualification was not in the original gift, and the trust not being executory, it may be said, the expression of what the testator meant to do was not sufficient to override his express words of gift. *Tollemache v. Earl of Coventry*, 2 Cl. & F. 611, 8 Bl. N. S. 547. See 12 Cl. & F. 555, note.

Tollemache v. The Earl of Coventry.

But in that case there seems to be the authority of V.-C. Leach, Lord Eldon, and Lord Lyndhurst, against that of Lord Brougham, and *quære*, whether the decision is not wrong. See, too, *per* Lord St. Leonards, in *Ker v. Lord Dungannon*, 1 Dr. & War. 536; and see *Mackworth v. Hinxman*, 2 Kee. 658.

But it seems a trust of chattels for the person or persons who should, for the time being, be in actual possession of certain settled estates, to the end that such chattels may go along with the same estates, so far as the rules of law or equity will permit, but so that they shall not vest in any person becoming entitled to the estates for an estate of inheritance, unless he attain twenty-one, would be good, though in the absence of those words it would be bad. *Harrington v. Harrington*, L. R. 5 H. L. 87.

On the effect of the words, "as far as the law allows," see *Pownall v. Graham*, 33 B. 242.

Direction
that
personalty
is not to
vest in a
tenant in
tail dying
under 21.

Where personalty is given upon the trusts of real estate, which has been settled upon living persons for life, remainder to their sons in tail, and there is a direction that the personalty is not to vest in any tenant in tail who dies under twenty-one, the clause is not void for remoteness, but refers only to tenants in tail by purchase, since none but tenants in tail by purchase can be said to take personalty under the will, personalty not being descendible. *Christie v. Gosling*, L. R. 1 H. L. 279; *Martelli v. Holloway*, L. R. 5 H. L. 532.

In such a case, in the event of a tenant in tail by purchase dying under twenty-one, leaving issue, the realty and personalty would become severed, since the realty would go to the issue, and the personalty to the next tenant in tail by purchase. But if the disposition of the personal estate contains or involves any trust for a tenant in tail who takes real estate by descent, the term tenant in

tail could not be limited to tenants in tail by purchase. See *per* Lord Westbury, 1 D. J. & S. 1; *Ibbetson v. Ibbetson*, 10 Sim. 495, 5 M. & Cr. 26; *Ferrand v. Wilson*, 4 Ha. 344.

A power, though authorising an appointment which would be void for perpetuity, is valid if the appointment is kept within the proper limits. *Slark v. Dakyns*, 10 Ch. 35.

Power exercised within the limits of perpetuity is good.

In the case of powers of appointment to particular classes of persons, the person to whom the appointment is made, must have been capable of taking under the instrument creating the power. Where the power is general, the appointees need only be capable of taking under the instrument exercising the power.

Distinction as regards perpetuity between general and special powers.

Thus, where a marriage settlement gave a power to appoint to children of the marriage, an appointment to a son for life, with remainder to such persons as he should by will appoint, was held void as to the remainder. *Wollaston v. King*, 8 Eq. 165; *Morgan v. Gronon*, 16 Eq. 1.

When a power is well executed, but a restraint upon anticipation is imposed upon the enjoyment, which is void for remoteness, the restraint will be rejected. *Fry v. Capper*, Kay, 163; *Teague's Settlement*, 10 Eq. 564; *Cunynghame's Settlement*, 11 Eq. 324.

Invalid restrictions rejected.

And when there is an absolute gift, subsequent qualification of the gifts which are void for remoteness will be rejected. *Carver v. Bowles*, 2 R. & M. 306; *Ring v. Hardwick*, 2 B. 352.

THE CY PRÈS DOCTRINE.

In many cases limitations of real estate, in themselves void for perpetuity, have been made good by the application of the so-called doctrine of *cy près*.

Cy près doctrine is a rule of construction.

This doctrine is a rule of construction, and applies not merely to executory trusts. *Parfitt v. Hember*, 4 Eq. 443.

It also applies to the execution of a power by will. *Line v. Hall*, 43 L. J. Ch. 107.

Parent will take an estate tail where the effect will be to give the property in the course marked out by the testator.

1. Where a testator has devised lands in a manner transgressing the limits of perpetuity, and the Court can, by giving estates tail to any of the devisees, carry the property in the precise course marked out by the testator, supposing the estates left to themselves, it will do so. *Humberston v. Humberston*, 1 P. Wms. 332; *Mony-penny v. Dering*, 16 M. & W. 418; *Parfitt v. Hember*, 4 Eq. 443.

Thus a limitation to an unborn person for life, remainder to his children successively in tail, will give the unborn person an estate tail; cases *supra*.

Doctrine may be applied to some members of a class and to part of the property included in a devise.

And the doctrine may be applied to some of a class, and not to others; as well as to a portion of the property included in a devise, and not to the rest. *Vanderplank v. King*, 3 Ha. 1; *Line v. Hall*, 22 W. R. 124; 43 L. J. Ch. 107.

The doctrine applies though the children were meant to take jointly in tail.

2. And where, by giving an estate tail to the parent, all the objects intended to be benefited by the testator would be included, this construction will be adopted, although the children were meant to take jointly in tail as purchasers. *Pitt v. Jackson*, 2 B. C. C. 51, cit. 2 Ves. jun. 849; *Vanderplank v. King*, 3 Ha. 1; *Williams v. Teale*, 6 Ib. 239.

Limits of the doctrine.

3. The doctrine will, however, not be applied where the result would be to carry the estate to persons not intended to be benefited by the testator. *Monypenny v. Dering*, 16 M. & W. 418, 7 Ha. 568, 2 D. M. & G. 174.

Whether it applies where the

4. It has sometimes been said that the *cy près* doctrine does not apply where the only intention is to create

successive life estates for ever, but the point is not covered by authority. It is clear that the doctrine will not apply where the intention is only to create a limited number of life estates on the principle already stated: *Seaward v. Willock*, 5 East. 198; nor will it apply where successive terms of years, determinable on the death of the devisee, are given. *Somerville v. Lethbridge*, 6 T. R. 213; *Beard v. Westcott*, 5 B. & Ald. 81, T. & R. 25.

intention is
to create
life estates
for ever.

On the other hand, it is clear that where an estate tail is given by the force of the limitation itself, words indicating that the successive interests are to be for life will be rejected, whether the estate tail is given by direct words: *Doe d. Elton v. Stenlake*, 12 East, 515; *Reece v. Steel*, 2 Sim. 238; *Hugo v. Williams*, 14 Eq. 225; *Forsbrook v. Forsbrook*, 3 Ch. 93; or by the effect of a gift over in default of issue: *Mortimer v. West*, 2 Sim. 274; *Woollen v. Andrews*, 2 Bing. 126; *Brooke v. Turner*, 2 Bing. N. C. 422; *Parfitt v. Hember*, 4 Eq. 443.

On the whole, there seems to be no reason why the same construction should not apply where the testator attempts to create life estates for ever. See *per* Sir J. Rolt, in *Forsbrook v. Forsbrook*, *sup.* p. 99, and *Parfitt v. Hember*, 4 Eq. 443, where no stress was laid on the gift in default of issue. And on this ground only *Woollen v. Andrews* and *Mortimer v. West*, where the gift over was not on an indefinite failure of issue, can be held satisfactory.

5. The *cy près* construction does not apply where the estates are limited to children of unborn persons in fee. *Bristow v. Warde*, 2 Ves. jun. 836; *Hale v. Pew*, 25 B. 835.

It does not
apply
where the
children
take in fee.

The doctrine does not apply to personalty nor to a mixed fund. *Routledge v. Dorril*, 2 Ves. jun. 865; *Boughton v. James*, 1 Coll. 44, 1 H. L. 406.

It does not
apply to
personalty.

ACCUMULATION.

Trust for accumulation beyond the limits of perpetuity is void *in toto*.

A trust for accumulation beyond the limits of perpetuity is entirely void *ab initio*, whether before or since the Thellusson Act, and whether it be for a purpose excepted from the operation of the Act or not, unless it be for the payment of debts. *Curtis v. Lukin*, 5 B. 147; *Scarbrick v. Skelmersdale*, 17 Sim. 187.

The Thellusson Act.

And by the Thellusson Act, 39 & 40 Geo. III., cap. 98, accumulation by will is restrained for any longer term than twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the testator, or during the minority or respective minorities only of any person or persons who, under the trusts of the will, would for the time being, if of full age, be entitled to the rents and profits or the interest directed to be accumulated.

By section 2 provisions for the payment of the debts of the deviser or other person or persons, and provisions for raising portions of the children of the deviser, or of any person taking any interest under the will, and directions touching the produce of timber or wood, are excepted from the Act.

The statute applies if property is so given as to involve accumulation.

An express direction to accumulate is not necessary to bring the property within the statute; it is enough if the property is given in such a manner that accumulation becomes necessary: *Tench v. Cheese*, 6 D. M. & G. 453; *Macdonald v. Bryce*, 2 Kee. 276; the decree in *Countess of Bective v. Hodgson*, 10 H. L. 656; *Wade Gery v. Handley*, 1 Ch. D. 653.

Accumulation by trustees of money to be laid out at once is

But when property is directed to be applied to certain purposes at once, but is accumulated owing to the neglect of trustees, or from some other reason, the statute does not apply: *Lombe v. Stoughton*, 12 Sim. 304; where the

direction to accumulate was merely subsidiary to the general trusts. See *Phipps v. Kelynge*, 2 V. & B. 57. not within the statute.

A direction to keep up policies effected by the testator in his lifetime on the lives of his children, the policies to be settled in case of marriage on their wives and children, is not a trust for accumulation within the statute. *Bassil v. Lester*, 9 Ha. 177. Direction to keep up policies is not within the statute.

A testator may direct accumulation during any one, but not more, of the periods allowed by the statute. *Wilson v. Wilson*, 1 Sim. N. S. 288. Testator may select any one period permitted by the statute for accumulation.

The period of twenty-one years is to be calculated from the death of the testator, exclusive of the day of his death, and must be a period immediately following his death. *Webb v. Webb*, 2 B. 493; *Gorst v. Lowndes*, 11 Sim. 434; *Shaw v. Rhodes*, 1 M. & Cr. 154; *A.-G. v. Poulden*, 3 Ha. 555. Period of 21 years runs from the death.

The words of the statute permitting accumulation during the minority of any person who, under the trusts of the will, would, if of full age, be entitled to the rents and profits, does not permit accumulation during the period before the birth of such person. *Haley v. Bannister*, 4 Mad. 275; *Ellis v. Maxwell*, 3 B. 596. Period of the minority of any person.

And it has been doubted, whether these words would authorise an accumulation during the minority of a person not born at the date of the will, but if not, they are superfluous. *Bryan v. Collins*, 15 B. 17; see *Peard v. Keke-wick*, 15 B. 166.

Accumulation directed within the limits of perpetuity, but beyond the limits of the statute, is void only beyond such limits. *Longdon v. Simson*, 12 Ves. 295; *Griffiths v. Vere*, 9 Ves. 127. Accumulation directed for periods longer than the statute allows is void only for the excess.

An accumulation for the purpose of paying debts, whether of the testator or other persons, is excepted from the Act, and is good, whether the debts be existing or future debts. *Varlo v. Faden*, 27 B. 255, 1 D. F. & J. Accumulation for payment of

debts is excepted from the statute.

211; and see *Barrington v. Liddell*, 2 D. M. & G. 505.

But the payment of debts must be *bonâ fide* and the primary object of the accumulation, and therefore if debts are only directed to be paid upon certain contingencies, and incidentally, the case is not within the exception. *Mathews v. Keble*, 4 Eq. 467, 3 Ch. 691.

What are portions within the exception.

The second exception is of portions for the children of the testator, or any person taking any interest under the will.

The children must be children either of the testator or of a person taking an interest under the will, and therefore if the accumulations are given to a class of children, some of whose parents take nothing under the Act, the exception does not apply. *Eyre v. Marsden*, 2 Kee. 564.

But the interest taken by the parent under the will need not be an interest in the fund to be accumulated. *Burt v. Sturt*, 10 Ha. 423; *Barrington v. Liddell*, 2 D. M. & G. 500.

And any interest however small given to the parent is sufficient. *Barrington v. Liddell*, 2 D. M. & G. 505; *Evans v. Hillier*, 5 Cl. & F. 126.

A fund to be accumulated and given to children living at the period of distribution is not a portion.

As to what are portions within the exception :

A fund to be accumulated and given to such children as may be living at the time when the accumulations are to cease, is not within the exception. *Burt v. Sturt*, 10 Ha. 415; *Drewett v. Pollard*, 27 B. 196.

Nor are accumulations to be added to capital and given to a child or to the members of a family. *Edwards v. Tuck*, 3 D. M. & G. 40; *Morgan v. Morgan*, 4 De G. & S. 175, 20 L. J. Ch. 441; *Wildes v. Davies*, 1 Sm. & G. 475; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Jones v. Maggs*, 9 Ha. 605; *Mathews v. Keble*, 4 Eq. 467; 3 Ch. 691.

Nor is a fund directed to be accumulated and given to

a parent for life with remainder to her children : *Watt v. Wood*, 2 Dr. & Sm. 56. *Middleton v. Losh*, 1 Sm. & G. 61, seems irreconcilable with the other decisions, unless it can be supported on the ground that the provision was called a portion ; see 10 Ha. 426.

But a direction to accumulate a sum to pay portions charged by another instrument is within the exception. *Halford v. Stains*, 16 Sim. 488 ; *Barrington v. Liddell*, 2 D. M. & G. 505.

And the exception extends also to portions created by the will itself. *Beech v. Lord St. Vincent*, 3 De G. & S. 678, 3 Jur. N. S. 762.

And when an accumulation is directed to raise portions for children if there are any, and if not for some other purpose, the case is within the exception only in the former event. *Re Clulow's Trust*, 1 J. & H. 639.

When there is an indefeasible gift, the legatee has a right to his property at twenty-one, and a direction to accumulate will only be valid till then ; and this will be the case, it would seem, even though the direction to accumulate may be for a period exceeding the limits of the statute. *Gosling v. Gosling*, Johns. 265 ; *Coventry v. Coventry*, 2 Dr. & S. 470 ; see, however, *Talbot v. Jevers*, 20 Eq. 255.

This principle, however, does not apply where the legatees are charities. *Harbin v. Masterman*, 12 Eq. 559.

When property is given absolutely in the first place, and a direction is afterwards added to accumulate, the accumulations, so far as they are void by the statute, go to the person to whom the absolute interest is given. *Trickey v. Trickey*, 8 M. & K. 560 ; *Combe v. Hughes*, 34 B. 127, 2 D. J. & S. 657.

And where an estate is devised subject to a trust for accumulation which is void, the trust sinks for the benefit

Accumulation to pay portions charged by another instrument is within the exception.

Portions given by the will itself are within the exception.

Legatee having a vested right may stop accumulation when he attains 21.

Case of Charities.

Destination of excessive accumulation.

of the persons for the time being entitled to the estates. *Evans v. Hellier*, 1 M. & Cr. 135, 5 Cl. & F. 114; *Re Clulow's Trust*, 1 J. & H. 639.

But the effect of the statute is not to accelerate any gifts in the will. *Green v. Gascoyne*, 4 D. J. & S. 565.

Accumulations released by the statute pass to the heir or next of kin as the case may be or to the residuary legatee if there is one.

Therefore accumulations released by the statute, if the fund to be accumulated is not a residue, in the case of personalty, go to form part of the capital of the residue: *Ellis v. Maxwell*, 3 B. 587; *A.-G. v. Poulden*, 3 Ha. 555; *Jones v. Maggs*, 9 Ha. 605; *Crawley v. Crawley*, 7 Sim. 427; and in the case of realty to the residuary devisee or heir according as the will is governed by the Wills Act or not. *Nettleton v. Stephenson*, 8 De G. & S. 366.

If the fund to be accumulated is residuary, the void accumulations go to the heir or next of kin, according to the nature of the property, and if the fund is mixed, to the heir and next of kin proportionately. *Green v. Gascoyne*, 4 D. J. & S. 565; *Halford v. Stains*, 16 Sim. 488; *Eyre v. Marsden*, 2 Kee. 564, 4 M. & Cr. 431; *Wildes v. Davies*, 1 Sm. & G. 475; see *Elborne v. Goode*, 14 Sim. 165.

The income of accumulations forms part of the capital of the residue.

In the same way the income of accumulations not being a residue, forms part of the capital of the residue. *Crawley v. Crawley*, 7 Sim. 427.

And income of accumulations of rents and profits retains its character of realty. *Eyre v. Marsden*, 2 Kee. 577.

When there is a contingent gift to A. with accumulation in the meantime, and the gift is given over to B. if the contingency does not happen, B. upon taking an indefeasible interest is entitled to the accumulations within twenty-one years from the testator's death, together with the income of those accumulations. *Morgan v. Morgan*, 20 L. J. Ch. 111, 441; but see *Bryan v. Collins*, 16 B. 14.

CHAPTER XXV.

CONDITIONS SUBSEQUENT.

IN the case of conditions subsequent, if the condition is impossible, impolitic, or illegal, the gift remains, at any rate, where there is no gift over. *Thomas v. Howell*, 1 Salk. 170; *Walker v. Walker*, 2 D. F. & J. 255; *Wilkinson v. Wilkinson*, 12 Eq. 604.

Conditions subsequent impossible, impolitic, or illegal, are ineffectual,

And it seems, even where there is a gift over, but the performance of the condition has become impossible, the previous gift remains. *Graydon v. Hicks*, 2 Atk. 16; *Jones v. Suffolk*, 1 B. C. C. 528; *Collett v. Collett*, 35 B. 312; *Sutcliffe v. Richardson*, 13 Eq. 606; and see *Wedgwood v. Denton*, 12 Eq. 290.

whether there is a gift over or not.

In most of these cases, however, the condition, being marriage with consent, became, by the death of the person, whose consent was required, a condition in general restraint of marriage. See, too, *Yates v. University of London*, L. R. 7 H. L. 438.

A condition subsequent requiring the consent of several persons becomes impossible and is discharged by the death of all, or even of one of them, though in the latter case it would seem the condition is satisfied by the consent of the survivors. *Peyton v. Bury*, 2 P. W. 625; *Grant v. Dyer*, 2 Dow. 73; *Jones v. Suffolk*, 1 B. C. C. 528; *Aislabie v. Rice*, 3 Mad. 256; see *Dawson v. Oliver Massey*, 2 Ch. D. 753.

Condition requiring marriage with consent of several persons becomes impossible by death of some.

Condition
not per-
formed
through
ignorance
takes effect

A condition subsequent not performed owing to the ignorance of the legatee of its existence, nevertheless, works a forfeiture, where the property is given over, whether in the case of personalty or of realty. *Hodges' Trusts*, 16 Eq. 92; *Porter v. Fry*, 1 Vent. 197; *Astley v. Earl of Essex*, 18 Eq. 290.

unless the
devisee is
heir.

But this does not apply, where the devisee is the heir who has a title independent of the will. *Doe d. Kenrick v. Lord Beauclerk*, 11 East, 667; *Doe d. Taylor v. Crisp*, 8 Ad. & E. 778; *Murphy v. Lineham*, I. R. 9 C. L. 123.

Condition
forfeiting
a legacy if
not
claimed.

So, when there is a clause forfeiting a legacy, if not claimed within a given time, the forfeiture takes effect, if the legacy is not claimed, though the legatee received no notice of the legacy or of the death of the testator. *Burgess v. Robinson*, 3 Mer. 7; *Tulk v. Houlditch*, 1 V. & B. 248; *Powell v. Rawle*, 18 Eq. 243.

What
amounts to
a claim.

But the filing of a bill for the administration of the estate before the time appointed is equivalent to a claim by the legatees, though they may not be parties to the suit. *Tollner v. Marriott*, 4 Sim. 19.

A condition
is effectual
without a
gift over in
the case of
realty.

In the case of realty a valid condition subsequent is effectual, even where there is no gift over. *Cooke v. Turner*, 15 M. & W. 727, 14 Sim. 493, 15 Sim. 611, 16 Sim. 482; and see *Evanturel v. Evanturel*, L. R. 6 P. C. 1.

In *Cooke v. Turner* there was a gift over, but the case seems to have been decided at common law independently of the gift over.

And a condition subsequent may operate to destroy a contingent, as well as to divest a vested estate. *Egerton v. Earl Brownlow*, 4 H. L. 1.

Personalty
follows the
same rule
except so
far as it is

With regard to personalty, a condition subsequent is effectual without a gift over, except so far as the rules of the civil law have been adopted with regard to certain

classes of conditions, see *post*, p. 312. *Dickson's Trust*, 1 Sim. N. S. 37; *Craven v. Brady*, 4 Eq. 209.

modified by the doctrine of *in terrorem*.

As to what conditions are valid, it has been said, that nothing can be made the subject of a condition in a will, which could not be made the subject of a contract or wager in life. See *per* the Lord Chief Baron, *Egerton v. Earl of Brownlow*, 4 H. L. 1, p. 150.

Test of validity of a condition.

Perhaps no general rule can safely be laid down; but, independently of the question whether a condition involves anything illegal or impolitic, in order that it may be effectual the meaning of the testator must be reasonably clear and precise; and, therefore, conditions to reside in a certain house, and to educate children in England, have been held too uncertain to work a forfeiture. *Fillingham v. Bromley*, T. & R. 530; *Clavering v. Ellison*, 3 Dr. 451, 7 H. L. 707.

Condition of residence must be clearly defined.

A condition not to dispute a will is valid in law if the will is unsuccessfully disputed, though it will not avail to make an invalid disposition good. *Cooke v. Turner*, 15 M. & W. 727; *Evanturel v. Evanturel*, L. R. 6 P. C. 1; *Stevenson v. Abingdon*, 11 W. R. 935; see *Warbrick v. Varley*, 30 B. 347.

Condition not to dispute a will.

On the other hand, a condition not to institute legal proceedings touching the estate and effects devised, is too general, and is bad. *Rhodes v. Muswell Hill Land Co.*, 29 B. 561.

CONDITIONS IN RESTRAINT OF MARRIAGE.

A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty. *Jones v. Jones*, 1 Q. B. D. 279; *Bellairs v. Bellairs*, 18 Eq. 510.

Condition subsequent in restraint of marriage is good in realty.

But such a condition is void, if imposed upon a tenant

But not as

regards an estate tail.

in tail, as repugnant to the estate. *Earl of Arundel's Case*, 3 Dyer, 342 b.

Condition in restraint of marriage is void in personalty. Mixed fund.

It is clear, that in the case of personalty a condition subsequent in general restraint of marriage is void. *Morley v. Rennoldson*, 2 Ha. 570.

And the same rule applies to a mixed fund arising from the proceeds of sale of realty and pure personalty. *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bellairs v. Bellairs*, 18 Eq. 510.

Legacy out of proceeds of sale of land.

And it seems, that a legacy out of the proceeds of land directed by the testator to be converted would follow the same rule. See *Hart's Trust*, 3 De G. & J. 195; *Bellairs v. Bellairs*, supra.

Limitation till marriage is good.

On the other hand, a limitation to a person till marriage is good, the intention being to provide for the person while he remains unmarried, and not to prevent him from marrying. *Heath v. Lewis*, 3 D. M. & G. 954.

Conditions in partial restraint of marriage are good though they may be ineffectual.

And conditions in partial restraint of marriage are valid, both with regard to realty and personalty, though with regard to the latter the further question arises whether they are *in terrorem* or not.

Thus, conditions restraining a widow or widower from marrying again, whether it be the widow of the testator or of a stranger: *Evans v. Rosser*, 2 H. & M. 190; *Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. D. 399; or requiring a marriage with consent: *Sutton v. Jewks*, 2 Ch. Rep. 95; or restraining marriage before a certain age: *Stackpoole v. Beaumont*, 3 Ves. 89, are good as conditions, though they may be ineffectual if there is no gift over, on the principle hereafter mentioned.

Doctrine of *in terrorem*.

In the case of personalty, certain conditions subsequent, though good in law, are, in accordance with the rule of the Civil Law, held to be void, and *in terrorem* merely, if there is no gift over.

Of this nature are the conditions in partial restraint of marriage already mentioned. *Marples v. Bainbridge*, 1 Mad. 590; *Reynish v. Martin*, 3 Atk. 330; *Wheeler v. Bingham*, 1 Wils. 135, 3 Atk. 364; *W. v. B.*, 11 B. 621.

And the same rule applies to a condition not to contest the will. *Powell v. Morgan*, 2 Vern. 90.

But if there is a gift over, these conditions are effectual, the gift over being considered sufficient evidence that they were not meant to be *in terrorem* merely. *Cleaver v. Spurling*, 2 P. Wms. 526; *Tricker v. Kingsbury*, 7 W. R. 652; *Charlton v. Coombes*, 11 W. R. 1038; *Craven v. Brady*, 4 Eq. 209.

On the question whether the doctrine of *in terrorem* applies to conditions precedent, the cases show :

Whether
the doctrine
applies to
conditions
precedent.

1. A condition precedent, requiring consent to marriage generally, without limitation of age, is effectual if there is a gift over. *Malcolm v. O'Callaghan*, 2 Mad. 349; *Gardiner v. Slater*, 25 B. 509.

2. The gift of a smaller sum, in the event of marriage without consent, has the same effect. *Creagh v. Wilson*, 2 Vern. 572; *Gillett v. Wray*, 1 P. Wms. 284.

3. A condition precedent, requiring consent to marriage if under a certain age, is good if there is no gift over. *Stackpole v. Beaumont*, 3 Ves. 89.

4. A condition precedent not to marry under a certain age is good, though there is no gift over. *Yonge v. Furse*, 8 D. M. & G. 756.

5. A gift to a legatee, if he marries a particular person, only takes effect in that event. *Davis v. Angel*, 4 D. F. & J. 524. *Quere* whether *Smith v. Cowdery*, 2 S. & St. 358, is overruled.

6. But it seems a condition precedent requiring marriage with consent generally, and without a gift over, would be considered *in terrorem* merely. *Reeves v. Herne*,

5 Vin. Ab. 343, pl. 41; *Reynish v. Martin*, 3 Atk. 330; see *Clarke v. Parker*, 19 Ves. 1.

Waiver of conditions by the testator.

In cases under 4 and 5 the conditions can only be waived testamentarily, and no consent of the testator to a marriage in his lifetime, not within the condition, will make the gift good.

Consent of the testator to a marriage in his lifetime satisfies a condition requiring consent.

But where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 V. & B. 479; *Wheeler v. Warner*, 1 S. & St. 304; see *Violet v. Brookman*, 5 W. R. 342.

And the condition does not apply to a subsequent marriage. *Hutcheson v. Hammond*, 3 B. C. C. 128; *Crommelin v. Crommelin*, 3 Ves. 227.

Consent of testator to a marriage to take place after his death.

But in such a case the consent of a testator to a marriage to take place after his death does not obviate the necessity for the consent of the persons named in the will. *Lowry v. Pattison*, 1 R. 8 Eq. 372.

And, where the gift is till marriage, the consent of the testator to a marriage does not extend the gift. *Bullock v. Bennett*, 7 D. M. & G. 283.

Condition of marriage with consent is satisfied by a second marriage with consent.

It seems, that where there is gift upon marriage with consent, the legatee has her whole life to perform the condition, and the legacy is not forfeited by a first marriage without consent. *Randall v. Payne*, 1 B. C. C. 55; *Beaumont v. Squire*, 17 Q. B. 905. *Clifford v. Beaumont*, 4 Russ. 325, was decided on the ground, that the gift was only upon a marriage with consent, which had not in fact been obtained.

But if other provision is made for the legatee in the event of marriage without consent, the condition must be limited to a first marriage. *Lowe v. Manners*, 5 B. & Ald. 917.

Condition requiring

In the case of a condition requiring the consent of

several persons, if the consent required is that of executors or trustees, the consent of those who renounce is not necessary. *Worthington v. Evans*, 1 S. & St. 165; *Boyce v. Corbally*, Ll. & G. temp. Plunkett, 102; *Ewens v. Addison*, 4 Jur. N. S. 1034; see *Clarke v. Parker*, 19 Ves. 1.

the consent of several persons how performed.

But if there is only a single executor who renounces, his consent must, it seems, be obtained. *Graydon v. Hicks*, 2 Atk. 16; but the case is doubtful.

And a condition requiring the consent of several persons is performed by obtaining the consent of the survivors. *Ewing v. Anderson*, 7 W. R. 23; *Dawson v. Oliver Massey*, 2 Ch. D. 753.

Where a testator directs, that if a certain sum should be applied in favour of A., A. should apply a sum of different amount in favour of B., the condition will be compulsory on A. only if the whole of the sum in question is applied in his favour, and the condition will not be apportioned. *Caldwell v. Cresswell*, 6 Ch. 279; *Fazakerley v. Ford*, 4 Sim. 390.

Apportionment of condition.

A condition precedent in a will must be performed according to its terms, and the court has no power to relieve the legatee from any of them. Thus, a right of pre-emption given to a person, if he pays a sum of money within a given time, followed by a disposition of the property if the money is not paid within the time, must be strictly complied with. *Brooke v. Garrod*, 3 K. & J. 608, 2 De G. & J. 62.

Right of pre-emption.

Similarly, a condition requiring a release within a given time, with a gift over, if the release is not given within the time, must be literally complied with. *Simpson v. Vickers*, 14 Ves. 341, 348.

Condition requiring a release.

But if there is no gift over, a release given within a reasonable time will satisfy the condition. *Simpson v. Vickers*, 14 Ves. 341; *Taylor v. Topham*, 1 B. C. C. 168;

Paine v. Hyde, 4 B. 468 ; see *Scarlett v. Lord Abinger*, 84 B. 338 ; *Ledward v. Hassels*, 2 K. & J. 370.

A legacy given on condition of conveying real estate to a third person gives a legatee who has conveyed no lien upon the land for the legacy. *Barker v. Barker*, 10 Eq. 438.

Perform-
ance of
conditions.

As to the performance of conditions to take a particular name, see a valuable note in Davidson's Prec., vol. iii., 356, to which add *D'Eyncourt v. Gregory*, 1 Ch. D. 441.

As to conditions of residence, see *Wynne v. Fletcher*, 24 B. 480 ; *Walcot v. Botfield*, Kay, 534 ; *Clavering v. Ellison*, 7 H. L. 707, and cases there cited ; *Parry v. Roberts*, 19 W. R. 378.

REPUGNANT CONDITIONS.

Conditions repugnant to the estate previously given are void.

Restraints
upon alien-
ation.

Thus conditions in general restraint of alienation are bad, if absolute interests have been given in the first place.

1. Where there is a devise in fee, followed by an absolute restraint upon alienation, the restraint is void for repugnancy. Litt. 222 *b.* sec. 360 ; *Hood v. Oglander*, 35 B. 525.

But a limited restriction upon alienation is good.

Thus, a condition not to sell except to a certain class of persons is good. Litt. 223 *a.* sec. 361 ; *Doe d. Gill v. Pearson*, 6 East, 173 ; *Re Macleay*, 20 Eq. 186. See *Ludlow v. Bunbury*, 35 B. 36.

But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Muschamp v. Bluett*, Bridg. 137 ; *Attwater v. Attwater*, 18 B. 330.

And a restraint upon alienation limited in time is

good, if there is a gift over, but not otherwise. *Large's Case*, 2 Leon. 82. 1 Coll. 445, 2 Jarm. 16; *Renaud v. Tourangeau*, L. R. 2 P. C. 4.

On the other hand, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis v. Hiscox*, 4 M. & C. 201; *Ware v. Cann*, 10 B. & Cr. 433.

Restraint upon alienation by any particular form of conveyance.

And the same is the case with a direction that rents are not to be raised. *A.-G. v. Catherine Hall*, Jac. 395; *A.-G. v. Greenhill*, 33 B. 193.

Similarly in regard to personalty when an absolute interest has been given, a gift over, if the legatee disposes of his interest, is void. *Bradley v. Peixoto*, 3 Ves. 324; *Jones' Will*, 23 L. T. N. S. 211.

Gift over if legatee disposes of his interest.

2. Similarly a gift over, if the legatee does not dispose of his interest or dies intestate, is void both as regards realty and personalty. *Holmes v. Godson*, 2 Jur. N. S. 383, 25 L. J. Ch. 317; *Barton v. Barton*, 3 K. & J. 512; *Lightbourne v. Gill*, 3 B. P. C. 250; *Re Mortlock's Trusts*, 3 K. & J. 456; *Re Yalden*, 1 D. M. & G. 53; *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Perry v. Merritt*, 18 Eq. 152.

Gift over if legatee dies intestate.

Such conditional gifts over are good according to Scotch law. *Barstow v. Pattison*, L. R. 1 H. L. Sc. 392.

A gift over in the event of a previous gift being void at law or in equity is good. *De Themmines v. De Bonneval*, 5 Russ. 288.

3. A condition intended to determine an estate tail in part only, for instance, a clause directing that the interests of tenants in tail shall cease as concerns the rights and interests of the person making default, but not farther otherwise, is void. *Seymour v. Vernon*, 10 Jur. N. S. 487, 12 W. R. 729.

Condition determining an estate tail in part.

A condition in certain events determining estates tail,

Estate tail to cease as

if the
tenant in
tail were
dead.

as if the tenant in tail were dead, will be made good by supplying the words dead without issue. *Astley v. Earl of Essex*, 18 Eq. 290.

Absolute
interest
directed to
cease as if
the donee
were dead.

But, if an absolute interest has been given, such a condition will be ineffectual, since the legatee's interest would not determine with his death, and, therefore, the interest directed to cease is not the exact interest previously given. *Bird v. Johnson*, 18 Jur. 976; *Catt's Trusts*, 2 H. & M. 46, 33 L. J. Ch. 495.

Conditions
postponing
enjoyment
beyond 21.

4. So, too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of twenty-one are void, unless the property is otherwise disposed of in the meantime. *Saunders v. Vautier*, Cr. & Ph. 240; *Rocke v. Rocke*, 9 B. 66; *Re Young's Settlement*, 18 B. 199; *Gosling v. Gosling*, Johns. 265.

Annuitant
cannot be
restrained
from antici-
pation.

A gift to a person of an annuity, or of a sum to purchase an annuity, vests a sum equivalent to the annuity in the legatee at the testator's death, and a restraint upon anticipation, except in the case of a married woman, is of no effect. *Woodmeston v. Walker*, 2 R. & M. 197; *Stokes v. Cheek*, 28 B. 620; *Gilbert v. Lewis*, 1 D. J. & S. 38.

And when trustees are directed to purchase a Government Annuity in the name of a legatee for his life, a gift over upon bankruptcy is equally ineffectual. *Hunt Foulston v. Furber*, 24 W. R. 756. *3 Cl. & F. 585*

Whether a
gift over
upon bank-
ruptcy is
effectual.

Where, however, a sum is given to trustees to purchase an annuity to be paid to the proper hands of the legatee, and the annuity is given over upon anticipation, bankruptcy, or assignment, the cases are conflicting.

It would seem, upon principle, that the court would not recognise any system of trusts intended to control the absolute right of a person, *sui juris*, over his property, and it was so held in *Day v. Day*, 1 Dr. 569,

which, however, was not followed in *Power v. Hayne*, 8 Eq. 262, and *Halton v. May*, 24 W. R. 754. 3 N. S. 148

It may be noticed that *Power v. Hayne*, decided not only that the gift over in the event of assignment would be good, but also that the annuitant was only entitled to personal enjoyment, so that upon his death before the tenant for life there was an intestacy. The gift over upon bankruptcy or assignment might, however, perhaps be considered not inconsistent with the vested right of the legatee to the value of the annuity, if he did not assign or become bankrupt.

5. In the same way life interests must, as long as they last, be subject to the ordinary legal incidents attaching to property, and cannot, for instance, be exempted from the operation of the Bankruptcy Laws. *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66.

Life interest must be subject to the bankruptcy laws.

A mere trust for maintenance during the life of a person at the discretion of trustees, without giving him any interest in the subject-matter of the bequest, has been held not to pass to his assignees upon bankruptcy: *Twopenny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, 10 Sim. 642, a very doubtful case. But the better opinion appears now to be, that though the discretion might not be interfered with, so much as the trustees think fit to apply for the benefit of the bankrupt would pass to his creditors. See *Coe's Trust*, 4 K. & J. 199.

Whether a trust for maintenance passes to the creditors of a bankrupt.

But if a life interest is given in the first instance, a clause directing the income to be applied towards the maintenance of the legatee after his bankruptcy will not prevent the interest from passing to the assignee. *Youngehusband v. Gisborne*, 1 Coll. 401.

A discretion to trustees to pay or not to pay the income to the legatee for life, determines on the bankruptcy of the legatee, unless the trustees are directed to

withhold and accumulate the income, and the accumulations are given over. *Snowdon v. Dales*, 6 Sim. 524; *Piercy v. Roberts*, 1 M. & K. 4.

Life interest may be determined on bankruptcy.

But although life interests are expressly given they can be determined by a conditional limitation over upon bankruptcy or alienation by the legatee. *Rochford v. Hackman*, 9 Ha. 475.

And a proviso for cesser of the life interest is sufficient without a limitation over. *Dommett v. Bedford*, 6 T. R. 684; *Joel v. Mills*, 3 K. & J. 458.

The distinction between condition and limitation is immaterial.

Effect of gift over for maintenance of bankrupt and his family.

It appears to be indifferent whether the original gift is only till bankruptcy, or whether it is a life interest with a conditional determination upon bankruptcy.

When the life interest is given over upon bankruptcy for the maintenance of the bankrupt and his family, half the income goes to his assignees. *Rippon v. Norton*, 2 B. 63.

But if the trustees have a discretion as to the amount to be applied towards the maintenance of the bankrupt and his family respectively, an inquiry will be directed as to how much ought to be applied for each. *Page v. Way*, 3 B. 20; *Kearsley v. Woodcock*, 3 Ha. 185; *Wallace v. Anderson*, 16 B. 533.

If, however, the trustees have a discretion to apply the fund for the maintenance of the bankrupt or his family, their discretion remains, though whatever they think fit to apply for the bankrupt belongs to his creditors. *Lord v. Bunn*, 2 Y. & C. C. 98; *Holmes v. Penny*, 3 K. & J. 90.

Whether bankruptcy determines a power of appointing to children.

It may be noticed that a gift over upon the bankruptcy of the tenant for life does not determine a power vested in him of appointing the property in question to his children, unless there are directions inconsistent with the subsistence of the power, such as a direction to distribute the property at once among the children in the event of bankruptcy. *Wickham v. Wing*, 2 H. & M. 436; *Has-*

well v. Haswell, 28 B. 26, 2 D. F. & J. 456 ; see *Potts v. Britton*, 11 Eq. 483.

Where the property is given over upon alienation the term has been held to include only voluntary alienation, and not a hostile bankruptcy. *Lear v. Leggett*, 1 R. & M. 690 ; *Pym v. Lockyer*, 12 Sim. 394 ; *Graham v. Lee*, 23 B. 388.

Meaning of the term alienation.

On the other hand, the presentation of a petition by the legatee under the Insolvent Debtors' Act, or under the arrangement clauses of the Bankruptcy Act, 1869, is a voluntary alienation. *Rochford v. Hackman*, 9 Ha. 475 ; *Amherst's Trusts*, 13 Eq. 464.

If, however, there is a strong intention of personal benefit to the legatee, as if the gift is to him for life and not to his assigns, a gift over upon alienation has been held to include bankruptcy. *Cooper v. Wyatt*, 5 Mad. 482.

As to the meaning of alienation, see *Avison v. Holmes*, 1 J. & H. 530, p. 540 ; and as to what is a forfeiture, see *Montefiore v. Enthoven*, 5 Eq. 35.

Insolvency has no technical meaning, but means inability to pay debts. *Freeman v. Bowen*, 35 B. 17 ; *Re Muggeridge*, Joh. 625, 29 L. J. Ch. 288 ; see *De Tastet v. Le Tavernier*, 1 Kee. 161 ; *Billson v. Crofts*, 15 Eq. 314.

Meaning of insolvency.

A declaration of insolvency in S. Australia is insolvency within the meaning of a gift over upon insolvency. *Aylwin's Trusts*, 16 Eq. 585.

Where the property is given over upon bankruptcy, the gift over, *prima facie*, includes a bankruptcy which takes place after the date of the will, and is subsisting at the testator's death, notwithstanding strong words of futurity. *Yarnold v. Moorhouse*, 2 R. & M. 364.

Gift over upon bankruptcy includes a subsisting bankruptcy

And it has been held to include a bankruptcy which took place before the date of the will, and was subsisting

at the death. *Manning v. Chambers*, 1 De G. & S. 282 ; *Seymour v. Lucas*, 1 Dr. & Sm. 177 ; *Trappes v. Meredith*, 10 Eq. 604, 7 Ch. 248.

A bankruptcy annulled before anything is payable will not work a forfeiture.

But since the object of the gift over is merely to preserve the property from going to strangers, if the bankruptcy is annulled before anything becomes payable to the assignee, the forfeiture does not take effect. *White v. Chitty*, L. R. 1 Eq. 372 ; *Lloyd v. Lloyd*, ib. 2 Eq. 722 ; *Trappes v. Meredith*, 9 Eq. 229 ; see *Robins v. Rose*, 43 L. J. Ch. 334.

But if one of the terms of the annulment is that the dividends accruing up to that time should be paid to the assignee, the forfeiture takes effect, though the bankruptcy may be annulled before he receives anything. *In re Parnham's Trusts*, 13 Eq. 413.

These principles have no application where the freedom from bankruptcy is a condition precedent to the vesting. *Cox v. Fonblanque*, 6 Eq. 482.

Bankruptcy during prior life estate.

Similarly, if the life interest given over on bankruptcy is subject to a prior life interest, the gift over takes effect on a bankruptcy during the life of the prior tenant for life. *Sharp v. Cosserat*, 20 B. 470 ; *Muggeridge's Trust*, Johns. 625.

And a gift over upon bankruptcy will carry over an accrued share directed to go in the same manner as the original share, though not accruing till after bankruptcy. *Dorsett v. Dorsett*, 30 B. 250.

6. In giving property to a woman the marital right will be held to be excluded only by a clear indication of intention to exclude it.

What words create a separate use.

The word "separate" is sufficient for this purpose whether the legatee is married or not. *Archer v. Rorke*, 7 Ir. Eq. 478.

On the other hand, such words as "own use," "absolute use," or to pay to "her own proper hands," are not

enough, whether the legatee is married or single, or whether trustees are interposed or not. *Rycroft v. Christy*, 3 B. 238; *Tyler v. Luke*, 2 R. & M. 183; *Blacklow v. Laws*, 2 Ha. 49; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. C. 651.

But if the legatee is married at the time and the legacy is directed to be at her own disposal, a separate use is created. *Kirk v. Paulin*, 7 Vin. Ab. 95, pl. 43; *Prichard v. Ames*, T. & R. 222.

So, too, if she is married and her receipt is declared to be a sufficient discharge. *Lee v. Prieaux*, 3 B. C. C. 381; *Re Lorimer*, 12 B. 521.

And where a legacy was given, if husband and wife should not be living together, half to the husband and half to the wife absolutely, the wife took to her separate use. *Shewell v. Dwarries*, Johns. 172.

So, too, a direction that the devisee is to receive the rents herself, whether married or single, creates a separate use. *Goulder v. Camm*, 1 D. F. & J. 146.

The word sole may in some cases be sufficient to create a separate use, but *prima facie* it has no such technical meaning, and the burden of proof is upon those who assert it has. *Massy v. Rowen*, L. R. 1 Ir. Eq. 110, ib., 4 H. L. 488.

Effect of the word "sole" in creating a separate use.

In a marriage settlement where the whole object is to secure to the wife a separate estate, the word may have the force of separate. *Ex parte Ray*, 1 Madd. 199.

But in a will where no such intention can be presumed, further indication is necessary.

a. If the legatee be married at the date of the will, the word sole may be more easily referred to her status. *Inglefield v. Coghlan*, 2 Coll. 247; *Green v. Britten*, 1 D. J. & S. 649; *Hartford v. Power*, 1 R. 2 Eq. 204.

But not if the legatee be the testator's own wife so that

she must be discovert when the will takes effect. *Gilbert v. Lewis*, 1 D. J. & S. 38 ; *Green v. Marsden*, 1 Dr. 646.

b. If the legatee is unmarried at the time, but the testator shows that he contemplates her marriage, and expressly wishes to guard against the claims of a future husband, the same effect will follow. *Ex parte Killick*, 3 M. D. & De G. 480 ; *In re Tarsey's Trust*, L. R. 1 Eq. 561.

c. So, too, if a trust is created confined to the particular gift and no other motive for it is discernible : *Adamson v. Armitage*, 19 Ves. 416 ; but the mere interposition of trustees will not give the word the force of separate if the trust is created for the general purposes of the will, and not confined to the particular gift. *Massy v. Rowen*, *supra*.

Restraint
upon anti-
cipation.

7. A restraint upon alienation or anticipation may be attached to property given to the separate use of a married woman both with regard to realty and personalty, whether her interest is only a life interest or an absolute interest, provided the property produces income. And for this purpose it seems no distinction is to be drawn between anticipation and alienation. *Baggett v. Meux*, 1 Coll. 138, 1 Ph. 627 ; *Ellis' Trusts*, 17 Eq. 409.

Determines
with
coverture.

The restraint, however, attaches only to the separate estate, and therefore determines with coverture : *Barton v. Briscoe*, Jac. 603 ; *Jones v. Salter*, 2 R. & M. 208 ; *Woodmeston v. Walker*, 2 R. & M. 197.

But if nothing is done with the property in the meantime it revives on future coverture : *Tullett v. Armstrong*, 1 B. 1, 4 M. & Cr. 390 ; *Scarborough v. Borman*, 1 B. 34, 4 M. & Cr. 378 ; *Re Gaffee*, 1 Mac. & G. 541 ; unless the restraint is confined to marriage with a particular husband by name. *Morris v. Morris*, 4 Dr. 33 ; *Hawkes v. Hub-buck*, 11 Eq. 5.

But a sale or conversion of the property destroys the separate use : *Wright v. Wright*, 2 J. & H. 647.

Where there is a separate use the further question arises, whether there is a restraint on anticipation.

What words create a restraint upon anticipation.

Thus, a direction that there is to be no sale or mortgage of the estate devised or the rents arising from it during the life of the devisee, amounts to a restraint on anticipation. *Baggett v. Meux*, 1 Coll. 138, 1 Ph. 627; *Goulder v. Camm*, 1 D. F. & J. 146; *Steedman v. Poole*, 6 Ha. 198.

So a direction that the receipts of the devisee alone after the payment of the rents devised shall have become due, should be sufficient discharges. *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 D. M. & G. 597; *White v. Herrick*, 21 W. R. 454.

But a direction to pay to the legatee personally, or on her receipt alone, will not restrain anticipation. *Re Ross' Trust*, 1 Sim. N. S. 196; *Wagstaff v. Smith*, 9 Ves. 520, 524; *Acton v. White*, 1 S. & St. 429.

When the legatee has a power to appoint the accruing rents, but not by way of anticipation, and in default of appointment there is a gift to her for her separate use, the restraint upon anticipation applies only to the exercise of the power. *Barrymore v. Ellis*, 8 Sim. 1; *Medley v. Horton*, 14 Sim. 222.

But if the gift in default of appointment is followed by a receipt clause applied to the same rents as those she has power to appoint, the restraint upon anticipation will extend to the whole gift. *Moore v. Moore*, 1 Coll. 54; *Brown v. Bamford*, 1 Ph. 620.

CHAPTER XXVI.

LIMITATIONS BY WAY OF REMAINDER.—DIVESTING.

WHAT CANNOT BE GIVEN OVER.

IN some things nothing less than an absolute interest can be given, thus :

Consum-
able articles
cannot be
given over.

Things *quæ ipso usu consumuntur* cannot be given over, unless they form part of a stock-in-trade. *Randall v. Russell*, 3 Mer. 190 ; *Andrew v. Andrew*, 1 Coll. 690 ; *Groves v. Wright*, 2 K. & J. 347 ; *Bryant v. Easterson*, 7 W. R. 298, 5 Jur. N. S. 166 ; *Phillips v. Beal*, 32 B. 25 ; *Cockayne v. Harrison*, 13 Eq. 432 : see *Re Hall's Will*, 19 Jur. 974.

There can
be no re-
mainder
after an
absolute
interest.

Absolute interests can of course not be limited over by way of remainder ; thus a devise, if A. dies without heirs, after a prior devise to A. in fee, is void. *Tilbury v. Tarbut*, 3 Atk. 617, 1 Ves. sen. 88.

And in the same way absolute interests in personalty cannot be given to several persons in succession. *Byng v. Lord Strafford*, 5 B. 558.

A gift over
invalid in
itself does
not become
valid by
the death
of the prior
legatee be-
fore the
testator.

A gift over, which would be invalid supposing the prior legatee survives the testator, does not become valid by his death in the testator's lifetime.

Therefore, a gift of personalty to A. and the heirs of his body, remainder to B., lapses by A.'s death in the testator's lifetime. *Harris v. Davis*, 1 Coll. 416.

So, too, a gift of consumable articles to A. for life,

remainder to B., lapses by A.'s death before the testator. *Andrews v. Andrews*, 1 Coll. 690.

There can be no gift over of so much as a legatee does not dispose of where an absolute interest has been given to the legatee. *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Bower v. Goslett*, 27 L. J. Ch. 249, 6 W. R. 8. Gift over of so much as a legatee does not dispose of is void.

Nor can there be a gift over of what remains after payment of the debts of a legatee to whom an absolute interest is given. *Perry v. Merritt*, 18 Eq. 152.

However, a gift at the legatee's death of whatever remains after a gift to the legatee indefinitely, may be construed as a disposition of the residue at the legatee's death, so as to cut him down to a life estate. *Constable v. Bull*, 3 De G. & Sm. 411; *Adams' Trust*, 14 W. R. 18.

And if a fund is given to a person expressly for life, with an absolute power of disposing of it, a gift of it after the death of the donee of the power is good, so far as he does not exercise his power. *Pennock v. Pennock*, 13 Eq. 144; see *Re Brook's Will*, 2 Dr. & S. 362. Gift over after a life interest with power of disposition.

LIMITATIONS DISTINGUISHED.

Limitations fall most naturally into limitations disposing of property in which partial or contingent interests have been previously given, and limitations varying and rearranging previous dispositions.

A legal remainder of freehold must be supported by a previous estate of freehold, otherwise it can only be supported as an executory devise. Legal remainder and executory interests.

And as no limitation can be a remainder following upon an estate less than an estate for life, so no limitation can be a remainder following upon a determinable fee, or any greater estate. *Fearne*, C. R. 225; *Seymor's Case*, 10 Co. 95, b.

But where an estate can take effect as a remainder, it will never be construed an executory devise or springing use : *Carwardine v. Carwardine*, 1 Ed. 27 ; *Goodtitle v. Billington*, Dougl. 725, Fearne, C. R. 386 : the reason given being that "executory interests, not by way of remainder, unless engrafted on an estate tail, cannot be barred, and consequently there is a tendency in such interests to a perpetuity, which is contrary to the policy of the law." Smith's Ex. Dev. 71.

Incidents
of re-
mainders.

Contingent remainders can no longer fail by forfeiture, surrender, or merger, but they will fail by the failure of the particular estate of freehold, before the remainder is ready to come into possession. *Rhodes v. Whitehead*, 2 Dr. & Sm. 532 ; *Price v. Hall*, 5 Eq. 399 ; *Percival v. Percival*, 9 Eq. 386 ; *Brackenbury v. Gibbons*, 2 Ch. D. 417.

But this does not apply to equitable remainders, which are not remainders proper but in the nature of executory interests. *Hopkins v. Hopkins*, Ca. t. Talb. 44, 1 Atk. 581 ; *Re Eddel's Trust*, 11 Eq. 559.

Nor does it apply to personalty.

An estate
may be a
remainder
or an
executory
devise
according
to the
events.

An estate may, however, according to the events that happen, be either a remainder or an executory devise. For instance, if after life estates there is a devise to children in fee, and if they die under twenty-one over, the devise over, if there are children to take who die under twenty-one, would be an executory devise, yet the implied devise over, in case there were no children to take at all, would be a contingent remainder. *Evers v. Challis*, 18 Q. B. 224, 7 H. L. 531 ; *Brookman v. Smith*, L. R. 6 Ex. 291, p. 305.

Remainder
distin-
guished
from an
immediate
vested
estate sub-
ject to a
term.

A remainder must be distinguished from an immediate vested estate, subject to a term ; thus, where an estate of freehold is limited after a term, it is either a vested estate or an executory devise. For instance, a devise to A. for a term of eighty years, if he shall so long live, and after

his death to B., gives B. strictly speaking an executory interest, since A. may live longer than eighty years, and the freehold would therefore be in suspense during the remainder of A.'s life. It has, however, been held that B. takes a vested interest, "for the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingency." *Fearne*, C. R. 21; *Napper v. Sanders*, Hutt. 118, cit. 3 At. 781; *Lord Derby's Case*, cit. Lit. Rep. 370, *Fearne*, C. R. 22.

This applies, however, only "where the life cannot exceed the term, and the term must determine with the life." It does not apply, for instance, where the term is only for sixty years. *Beverley v. Beverley*, 2 Vern. 131.

In the same way a devise, after payment of debts, is not a remainder but an immediate vested interest. *Barnardiston v. Carter*, 1 P. W. 505, 3 B. P. C. 64; *Bagshaw v. Spencer*, 1 Ves. sen. 142; see 1 Coll. Jur. 378; and see *ib.* 214.

Devise after
payment of
debts is
vested.

Again, dispositions by way of remainder may be intended to take effect only after the determination of prior partial interests, or they may be alternative contingent remainders intended to provide for the case of prior contingent limitations not taking effect. In the former case, if any of the intermediate limitations are void, the remainders fail with them; in the latter the limitations are good if the events upon which they are to take effect happen. *Brudenell v. Elwes*, 1 East, 442; *Crompe v. Barrow*, 4 Ves. 681.

Remainders
and alter-
native con-
tingent
limitations.

Thus, in a devise to A. for life, then to his first son for life, and after his decease to the first and other sons of such first son successively in tail, and in default of issue of A., or in case of his not having any at his decease over, if A. has a son and grandson, the devise over in default of issue of A. is a disposition by way of remainder of something

not previously disposed of, while the devise, in case of his not having any issue at his decease, is an alternative contingent limitation, disposing of something previously disposed of, in the event of that disposition failing in a particular way. *Monypenny v. Dering*, 2 D. M. & G. 145; *Doe v. Challis*, 18 Q. B. 224, 7 H. L. 531; *Percival v. Percival*, 9 Eq. 386.

And the same limitation may, according to the events that happen, be a disposition to take effect after the failure of prior limitations, or a substitutional limitation intended to meet the case of prior limitations never taking effect at all. For instance, a limitation in default, or for want of persons to take under prior limitations for life or in tail, takes effect either in default of persons to take the prior estates, or after the determination of their estates. *Goodright v. Jones*, 4 Mau. & S. 88; *Lewis v. Waters*, 6 East, 336; see *Doe v. Dacre*, 1 B. & P. 250, 8 T. R. 112.

Whether a contingency runs through a whole series of limitations.

When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, the contingency *prima facie* applies to the whole series of limitations. *Davis v. Norton*, 2 P. W. 390; *Doe d. Watson v. Shipphard*, Dougl. 75; *Toldervy v. Colt*, 1 Y. & C. Ex. 240, 627, 1 M. & W. 250.

Similarly, when an interest is given to a person, and then in a certain event a different interest is given with limitations over, the contingency, applies to all the subsequent limitations. *Gray v. Golding*, 6 Jur. N. S. 474; *Cattley v. Vincent*, 15 B. 198; *Findon v. Findon*, 24 B. 83; *Lett v. Randall*, 10 Sim. 112; *Paylor v. Pegg*, 24 B. 105.

Cases where the subsequent limitations are independent gifts.

On the other hand, if the subsequent limitations, or any of them, can be looked upon as independent gifts, they will not be liable to the contingency of preceding gifts. *Lethieullier v. Tracy*, 8 Atk. 774, Amb. 204;

Boosey v. Gardiner, 5 D. M. & G. 122; *Doutty v. Laver*, 14 Jur. 188; *Partridge v. Foster*, 35 B. 545.

In the same way, if a particular gift is expressed to be made contingent from motives applicable to that gift only, subsequent gifts will not be contingent. *Horton v. Whittaker*, 1 T. R. 346.

And if subsequent gifts can be read as given, subject to the prior limitations, they will not be liable to the contingencies of prior gifts. *Sheffield v. Earl of Coventry*, 2 D. M. & G. 551; see *Pearson v. Rutter*, 3 D. M. & G. 398, 6 H. L. 61; *Hole v. Davies*, 34 B. 345.

Subsequent gifts subject to prior contingent gifts.

In the same way, when there has been a gift in one event to one set of issue in fee, and upon another event to another set of issue in tail, a gift over in default of such issue may be construed as referring to a failure of all the prior limitations, and not merely as a remainder dependent upon the limitations to the second class of issue taking effect. *Doe d. Lees v. Ford*, 2 E. & B. 970.

Where the ultimate limitation sums up the prior contingencies.

As to whether in a devise of Whiteacre to A. and his issue, and then to B. and his issue, and of Blackacre to B. and his issue, and then to A. and his issue, and in default of issue of A. and B. over, the ultimate gift includes both estates, see *Gordon v. Gordon*, L. R. 5 H. L. 254; see, too, *Adshead v. Willets*, 29 B. 358.

Whether an ultimate limitation applies to the whole of property which has been given in two independent lines.

DIVESTING.

A vested interest which is given over in certain events is divested, if those events happen, though the gift over may be void, or though the legatee to take under the gift over dies before the testator. *Doe d. Blomfield v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 6 W. R. 728, 27 L. J. Ch. 726; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. In *Jackson v. Noble*, 2 Kee. 590, the question was, whether the event upon which the gift over was to take effect had

A gift which is given over in certain events is divested if those events happen.

happened, and it was held it had not, the period during which it was to take effect being limited to the lives of the persons to take under the gift over.

But if the contingency of there being a person to take living at the time can be looked upon as part of the event upon which the gift over is to take effect, the original gift will remain if there is no such person. *Crozier v. Crozier*, 15 Eq. 282.

Substitu-
tional gifts
to survi-
vors.

In the case of a substitutional gift to several persons, or to such of them as may survive the tenant for life, if none survive the tenant for life the original gift remains, whether the gift is vested or contingent. *Sturgess v. Pearson*, 4 Mad. 411; *Wagstaff v. Crosbie*, 2 Coll. 746; *Re Saunders' Trust*, L. R. 1 Eq. 675.

It is indifferent whether the gift is in the simple form "to several, or the survivors," or whether there is an express gift over in the event of any members of a class dying before the tenant for life to the survivors; in such a case, if none survive the tenant for life, the original gift remains. *Harrison v. Foreman*, 5 Ves. 207; *Cambridge v. Rous*, 25 B. 409; *Marriott v. Abell*, 7 Eq. 478.

Substitu-
tional
gifts to
children.

Similarly the shares of parents given in the event of their dying before the tenant for life to their children, remain absolute if there are no children. *Smither v. Willock*, 9 Ves. 233; *Hodgson v. Smithson*, 21 B. 356, 8 D. M. & G. 604.

Distinction
between a
gift over
in certain
events of
the whole
and of a
partial
interest.

An important distinction must, however, be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of a portion of the prior interest in certain events. In the latter case the prior interest is divested only so far as is necessary to give effect to the gift over.

Thus, if there is a devise in fee, followed by a gift over to another person for life if the devisee dies without issue, the devisee in that event, nevertheless, takes the

fee, subject only to the life interest : *Gatenby v. Morgan*, 45 L. J. Q. B. 597; disapproving *Oates v. Brydon*, 3 Burr. 1895.

THE CONSTRUCTION OF GIFTS OVER.

When property is given over in one event to one person, and in another event to another, and both events occur simultaneously, the original gift is not divested. *Ormerod v. Riley*, 12 Jur. N. S. 112. See *Drennan v. Andrew*, 36 L. J. Ch. 1.

When there is a gift over upon a certain contingency, it will not take effect unless the exact contingency happens. Thus, if there is a gift to A. with a gift over if he dies in the testator's lifetime, and A. dies simultaneously with the testator, the gift over does not take effect. *Wing v. Angrave*, 8 H. L. 183.

There are here two distinct and independent events, in which the gift to A. will lapse, death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt, it may be said, that the gift over might be read as equivalent to "if A. does not survive me to B.;" but this would be making a will for the testator, since the event that has happened does not include the event contemplated, and it cannot be said, that if the gift over was to have effect, if A. died in the testator's lifetime, *a fortiori* it was to have effect if A. died simultaneously with the testator. The most that can be affirmed is that if the testator could be consulted he would probably say, that the gift over is to have effect equally in either event.

But where the events which happen include the events contemplated by the testator, so that it may be said, if the gift was to go over in the events mentioned, *a fortiori* it must have been meant to go over in the

Gifts over on two different events to different persons where both events happen.

The exact event must happen in order that a gift over may take effect.

Cases where the events which happen include the events

upon
which the
gift over is
to take
effect.

events that have happened, the gift over will take effect. This is the rule mentioned by Cicero as having been adopted in the case of *Curius v. Coponius*, "*M. Curium, qui hæres institutus esset ita, 'mortuo postumo filio,' cum filius non modo non mortuus, sed ne natus quidem esset, hæredem esse oportere.*" Pro. Cœc. 18.

And the test of the applicability of the rule will be found in the possibility of putting the argument in its favour in the form of *non modo non—sed ne quidem*—if, for instance, property is given to A. if he fulfil certain conditions, and if he neglect to fulfil them to B. and A. dies in the testator's lifetime, the gift over to B. will take effect, although strictly speaking the testator never contemplated, that the performance of the conditions annexed to the gift to A. might become impossible through A.'s death in his lifetime. The preceding estate being out of the way, in any mode whatever, the remainder takes effect; and the rule applies whether the gift is void in its inception or becomes void in its result. See *Jones v. Westcomb*, 1 Eq. Abr. 245, pl. 10; *Gulliver v. Wickett*, 1 Wils. 105; *Avelyn v. Ward*, 1 Ves. sen. 420; *Meadows v. Parry*, 1 V. & B. 124; *Warren v. Rudall*, 4 K. & J. 603, and 9 H. L. 420; *Brock v. Bradley*, 33 B. 670.

The failure of the prior gift in these cases was not owing merely to the fact that the first taker did not survive the testator, as in the cases under the former head, but to that fact, *plus* the non-performance of the condition, since, if the first taker had survived the testator he would not have taken an indefeasible interest till the condition had been satisfied.

So a gift to several persons by name, with a gift over if they should die in the testator's lifetime, will take effect with regard to the shares of those who are dead at the date of the will. *Barnes v. Jennings*, L. R. 2 Eq. 448.

If there is a gift to a person with a gift over in the event of his death in a particular manner, as for instance to A., and if he dies under twenty-one to B.

Construc-
tion of gifts
over upon
death of
the legatee
under a
given age.
Case where
the legatee
dies before
the testator
under the
given age.

1. If A. dies under twenty-one, in the lifetime of the testator, the gift over takes effect. *Darrel v. Molesworth*, 2 Vern. 378; *Willing v. Baine*, 2 Eq. Ab. 545, pl. 22; *Humphreys v. Howes*, 1 R. & M. 639; *Re Green's Estate*, 1 Dr. & Sm. 68; *Rackham v. De la Mare*, 2 D. J. & S. 74. In this case the failure of the prior gift is due not to lapse merely, since if A. had survived the testator the gift to him would not have been indefeasible until he had attained twenty-one.

2. If A. dies over twenty-one in the testator's lifetime, the gift over does not take effect. *Williams v. Chitty*, 3 Ves., jun., 545; *Doo v. Brabant*, 3 B. C. C. 393, 4 T. R. 706; *Humberstone v. Stanton*, 1 V. & B. 385. In this case since A., if he had survived, would have taken an indefeasible interest, the failure of the gift to him is due to lapse only, which the testator cannot be supposed to have contemplated, and the event on which alone there is a bequest to the claimant has not occurred.

Where the
legatee dies
over the
given age
before the
testator.

Where, however, the prior gift is to a class, the following rules may be laid down; suppose a gift to children as a class, followed by a gift over, if they die under twenty-one:—

1. If the contemplated class never comes into existence, the gift over takes effect on the principle already stated, *ante*: *Jones v. Westcomb*, 1 Eq. Ab. 245, pl. 10; *Mackinnon v. Sewell*, 2 M. & K. 202. In these cases the condition is more than fulfilled, since the events that have happened include the condition upon which the property is given over.

Gift to a
class
followed by
a gift over
if all die
under 21,
where the
class never
comes into
existence.

2. If members of the class come into existence, but die under twenty-one in the testator's lifetime. In this

If all die
under 21
before the
testator.

case, too, it seems the gift over will take effect and the same arguments would apply as to the previous case with the additional argument that the condition is in fact literally fulfilled. It is not by reason of lapse that the gift over takes effect, since if the legatees in question had survived the testator, the gift over would still have held good in the events that have happened. See *Brookman v. Smith*, L. R. 6 Ex. p. 308; *Mackinnon v. Peach*, 2 Kee. 555; but see *Greated v. Greated*, 26 B. 621.

If all die
before the
testator,
but not
under 21.

3. If members of the class come into existence, survive twenty-one, and die in the testator's lifetime the gift over will not take effect: *Tarbuck v. Tarbuck*, 4 L. J. Ch. 129; *Brookman v. Smith*, L. R. 6 Ex. 291, ib., 7 Ex. 271; or, to state the rule more generally, if all conditions are fulfilled which would entitle those taking under the prior gift to indefeasible interests, supposing they had survived the testator, if in other words the failure of the prior gift is due to lapse and lapse only, the gift over does not take effect.

GIFTS OVER UPON DEATH TREATED AS A CONTINGENT EVENT.

Gift over in
case of the
legatee's
death.

1. If there is an immediate gift to A., and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A.'s death before the testator. *Lord Bindon v. Earl of Suffolk*, 1 P. Wms. 96; *Cambridge v. Rous*, 8 Ves. 12; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. N. S. 634.

So, too, a gift to several, and in case of the death of either in the lifetime of the others or other, was confined to death before the testator, the death of one before the other being a certain and not a contingent event. *Howard v. Howard*, 21 B. 550.

It makes no difference that the gift in case of A.'s death is to his children. *Slade v. Milner*, 4 Mad. 144; *Schenck v. Agnew*, 4 K. & J. 405.

And this construction has been adopted where the gift over was "in case of his decease or at his decease." *Arthur v. Hughes*, 4 B. 506.

But, as a rule, when there is a gift to A. indefinitely, followed by a gift *at* his decease, A. will take only a life interest. *Constable v. Bull*, 3 De G. & S. 411; *Waters v. Waters*, 26 L. J. Ch. 624; *Adams' Trust*, 14 W. R. 18; *Joslin v. Hammond*, 3 M. & K. 110; *Reid v. Reid*, 25 B. 469.

Gift over *at* the legatee's death.

2. A gift over "in case of the death of A." has been construed as equivalent to "after his death" in the following cases:—

General intention that the gift was to take effect after A.'s death.

a. Where the gift is only of a life interest, and the remainder would otherwise be undisposed of. *Smart v. Clark*, 3 Russ. 365; *Tilson v. Jones*, 1 R. & M. 553.

b. Where the testator has given the absolute interest in another legacy in express terms, or has shown an intention to provide in all events for the person to take "in case of the death of A.," or has expressly provided for the death of the legatee in his lifetime with regard to another legacy to the same legatee, there is ground for arguing that the gift over in case of the death of A. was to take effect upon his death at any time. *Billings v. Sandom*, 1 B. C. C. 393; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Douglas v. Chalmer*, 2 Ves. jun. 501.

3. If the gift is after a life estate, or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession, whether before or after the testator. *Hervey v. M'Laughlin*, 1 Pr. 264; *Johnson v. Antrobus*, 21 B. 556; *Bolitho v. Hillyar*, 34 B. 180; and see *James v. Baker*, 8 Jur. 750.

Gift over in case of the legatee's death after a life interest.

It appears that a gift after a life interest to executors

for their trouble, with a gift over in case of death, would *prima facie* mean death before the testator. *Green v. Barrow*, 10 Ha. 459.

Gift over of realty in case of the death of the devisee.

4. In the case of realty a devise to A. simply in a will before the Wills Act, and in case of his death over, would perhaps be construed as to A. for life, and after his death over. *Bowen v. Scowcroft*, 2 Y. & C. Ex. 640; see, however, *Wright v. Stephens*, 4 B. & Ald. 574.

On the other hand, if the devise gives A. the fee, a gift over, in case of A.'s death, will be held to refer to his death before the testator. *Rogers v. Rogers*, 7 W. R. 541.

GIFTS OVER UPON DEATH COUPLED WITH A CONTINGENCY.

Gift over upon death without issue is not confined to death before the testator.

If there is an immediate gift to A., and if he dies without issue over, the gift over takes effect upon the death of A. without issue at any time, whether before or after the testator. *Farthing v. Allen*, 2 Mad. 310, 2 Jarm. 730; *Smith v. Stewart*, 4 De G. & Sm. 253; *Cotton v. Cotton*, 28 L. J. Ch. 489; *Bowers v. Bowers*, 8 Eq. 283, 5 Ch. 244; *Else v. Else*, 13 Eq. 196; *Varley v. Winn*, 2 K. & J. 705.

The fourth rule in *Edwards v. Edwards* is overruled.

Similarly, if the gift is future, as to A. for life and then to B., and if B. dies without issue over, the gift over will take effect upon the death of B. at any time without issue, whether before or after the tenant for life. *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, Ib. 408; overruling the so-called fourth rule in *Edwards v. Edwards*, 15 B. 357.

And similarly, a direction to settle a legacy upon marriage is *prima facie* not restricted to marriage in the lifetime of a tenant for life. *Witham v. Witham*, 3 D. F. & J. 758.

In what cases the

There may, however, be circumstances in the will

limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards v. Edwards* are probably not reconcileable with the rule laid down in *Ingram v. Soutten*. See *Allen's Estate*, 3 Dr. 380.

period of
defeasi-
bility will
be limited.

The following rules seem, however, to be admitted in *O'Mahoney v. Burdett*.

1. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue, are contemplated as taking through the medium of the same trustees, there is *primâ facie* reason for restricting the death without issue to death without issue before the period of distribution. *Galland v. Leonard*, 1 Sw. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 B. 357; *Beckton v. Barton*, 27 B. 99; *Dean v. Handley*, 2 H. & M. 635; see *Smith v. Colman*, 25 B. 217.

Where the donees to take upon death without issue of a prior legatee are contemplated as taking through the medium of a trust which determines at a certain time.

But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling v. Townshend*, 17 B. 245, 2 W. R. 28.

2. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the period of distribution. *Olivant v. Wright*, 1 Ch. D. 346; see *Re Anstice*, 23 B. 135; *Pearman v. Pearman*, 33 B. 394.

When all the dispositions of the testator have reference to the period of distribution.

So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and if any die without issue to the survivors, to be paid at the same time as the original share, death without issue will

be limited to such death under twenty-one. *Re Johnson's Trusts*, 10 L. T. N. S. 455.

Similarly, if the gift is to A. if living at the death of the tenant for life, and if not, to his children, and if he dies without children over, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews v. Lord*, 8 W. R. 405 ; see *Wood v. Wood*, 35 B. 587 ; *In re Hill's Trusts*, 12 Eq. 302.

When the legatee is to have the absolute control of his legacy at a certain time.

When gifts over subsequent to the gift over upon death without issue are expressly limited within a certain time.

Gifts over in several events one of which must happen, after prior gift with words of limitation or benefit.

3. When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark v. Henry*, 11 Eq. 222, 6 Ch. 588.

4. If there is a gift over upon death without issue before a given time of all the legatees whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons who are to take upon death of the prior legatees without issue is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gifts over to death of the prior legatees without issue before the same time. *Re Hayes' Will*, 9 Jur. N. S. 1068 ; *Re Sarjeant*, 11 W. R. 203 ; *Da Costa v. Keir*, 3 Russ. 360 ; see *Doe d. Lifford v. Sparrow*, 13 East, 359 ; *Lloyd v. Davies*, 15 C. B. 76.

5. If the gift is followed by words of limitation or benefit, as "to A., his heirs, and assigns," or "to A. for ever," or "to A. for his own use and benefit," and the property is then given over upon contingencies, one or other of which must happen ; as, for instance, upon death either with or without children, the defeasibility will be limited by the period of distribution, whether it is the testator's death or some other time, in order not to cut down the previous absolute interests to life interests merely. *Doe v. Sparrow*, 13 East, 359 ; *Clayton v. Lowe*, 5 B. & Ald. 686 ; *Gee v. Corporation of Manchester*, 17 Q. B. 737 ;

Woodburne v. Woodburne, 23 L. J. Ch. 836 ; *Da Costa v. Keir*, 3 Russ. 360 ; *Slaney v. Slaney*, 33 B. 631.

If, however, the gift is merely in general words without any express indication, that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling v. Townshend*, 2 W. R. 28 ; *Cooper v. Cooper*, 1 K. & J. 658 ; *Bowers v. Bowers*, 8 Eq. 283, 5 Ch. 244.

6. It is not, however, necessary in order to limit the defeasibility that the gifts over should be upon contingencies, one other of which must occur, so as to cut down the prior interest to a life estate, unless the defeasibility is limited.

General intention to give the legatees indefeasible interests at a certain time.

In *Clayton v. Lowe*, *Gee v. Mayor of Manchester*, and *Woodburne v. Woodburne*, *supra*, the interest of the surviving legatee would not necessarily have been reduced to a life estate, and if it is once clear that the legatee is to take an absolute interest, a gift over in one event is as inconsistent with that absolute interest as a gift over in several, one of which must occur.

And accordingly, where the intention to give indefeasible interests at a particular time is clear, the gift over upon a single contingency, as upon death without issue, will be limited to death without issue before that time. *Brother-ton v. Bury*, 18 B. 65 ; *Ware v. Watson*, 7 D. M. & G. 248 ; *Re Anstice*, 23 B. 135 ; *Clark v. Henry*, 11 Eq. 222, 6 Ch. 588 ; perhaps *Barker v. Cocks*, 6 B. 82, and *Davenport v. Bishopp*, 2 Y. & C. C. 463, come under this head.

7. If the gift is contingent, as to A. at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one.

Gift over upon death leaving children after a contingent gift.

It seems clear that this construction would be adopted if the gift over is upon the death of A., leaving children to his children, in order to provide for the children of A., if he dies under twenty-one leaving children: *Home v. Pillans*, 2 M. & K. 15; and it seems the same would be the case if the person to take under the gift is the widow of the legatee. *Randfield v. Randfield*, 8 H. L. 225.

The gift over upon death without issue cannot, however, be restricted to the time of vesting, where there is an express gift over upon death merely, before the time of vesting. *Martineau v. Rogers*, 8 D. M. & G. 328.

Whether the defeasibility would be limited where the gift over is to strangers is more doubtful. See *Andrews v. Lord*, 6 Jur. N. S. 865; and see *Dowling's Trusts*, 14 Eq. 463; *Smith v. Spencer*, 6 D. M. & G. 631.

Ultimate
gift over
upon death
without
issue
restricted
by the
defeasi-
bility in
the case of
a prior gift
being
limited.
Gift over
upon mar-
riage with-
out consent
confined to
marriage
under 21.

8. Where there is a gift to two persons, and if either dies under twenty-one without issue to the survivor, and if both die without issue over, the defeasibility will be restricted to the age of twenty-one. *Kirkpatrick v. Kilpatrick*, 13 Ves. 476; *Thackeray v. Hampson*, 2 S. & St. 214; see *Else v. Else*, 13 Eq. 196.

9. When there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Desbody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Amb. 662; *Osborn v. Brown*, 5 Ves. 527; *West v. West*, 4 Giff. 198.

10. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke v. Lubbock*, 1 Y. & C. C. 492; *Child v. Giblett*, 3 M. & K. 71.

CHAPTER XXVII.

SUBSTITUTION.

EVERY executory limitation intended to destroy prior interests in certain contingencies is in the widest sense substitutional. The term is, however, generally applied to limitations intended to provide for the death of prior legatees before the period of distribution.

Substitu-
tion de-
fined.

The simplest form of substitutional gift, introduced by the word "or," as for instance, to class A. or class B., generally involves the relation of greater to smaller class, or of ancestor to descendant.

It is, however, probable that a simple gift to A. or B., would now be considered substitutional. See *Carey v. Carey*, 6 Ir. Ch. 255 ; see, however, *Longmore v. Broome*, 7 Ves. 128 ; *Miller v. Chapman*, 24 L. J. Ch. 409 ; *Maude v. Maude*, 22 B. 290.

Whether a
gift to A.
or B. is
substitu-
tional.

But a gift to A. or B., or to A. or his children, as C. may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally. *Penny v. Turner*, 2 Ph. 493 ; *White's Trusts*, Joh. 656.

Gift to A.
or B., as C.
may ap-
point, is not
substitu-
tional.

When the contingency of surviving the period of distribution is applied both to the original and substituted class, if, for instance, the gift is to parents or their children living at the decease of the tenant for life, the gift will nevertheless be construed as substitutional. *Congreve v. Palmer*, 16 B. 435 ; *Atkinson v. Bartrum*, 28 B. 219.

Contin-
gency of
surviving
the period
of distribu-
tion ap-
plied to
original
and sub-
stituted
legatees.

“Or”
changed
into
“and.”

In such a case, however, if there is anything to show that the original and substituted class are to take co-ordinately, “or” will be read “and.” *Richardson v. Spraag*, 1 P. Wms. 433, where the gift was to such of the testatrix’s daughters, or daughter’s children, as should be living at her son’s death, “without considering any superiority or eldership whatever.” See *Shand v. Kidd*, 19 B. 310.

And where the direction was to pay a sum of money after the death of a tenant for life, “to all and every the testatrix’s nephews and nieces, to wit, A. or her children, B. or her children,” etc., to be equally divided between them, “or” was read “and”; the words under the *vide licet* being only an expanded description of the persons to take. *Eccard v. Brooke*, 2 Cox, 213.

So, too, where the gift is to such of several persons as should be living at the testatrix’s decease, or the issue of such of them as should be married, “or” will be read “and.” *Horridge v. Ferguson*, Jac. 583.

Gifts to
persons
“then”
living, or
their issue.

Upon the same principle, a gift to children living at the period of distribution, or *their* issue, will be construed as a gift to children then living, and the issue of those then dead. *King v. Cleveland*, 4 De G. & J. 477; *Philp’s Will*, 7 Eq. 151; *Burt v. Hillyar*, 14 Eq. 160.

Substitu-
tion dis-
tinguished
from gift
over to
take place
at any
time.

A substitutional gift, substituting one set of legatees for others dying before the period of distribution, must be distinguished from an executory gift over intended to take effect at any time. Thus, a gift to children living at a particular time, with a gift over, if any *such* children die leaving issue to their issue, is an executory limitation to take effect at any time. *La Roche v. Davies*, 3 Y. & C. Ex. 612, n.; *Ex parte Hunter*, 3 Y. & C. Ex. 610; *Howes v. Herring*, 1 M’Cl. & Y. 295.

On the other hand, if the gift is to children living at the period of distribution, with a gift to their issue if any such children die before becoming entitled, the gift

to the issue will be construed as substitutional, since children, living at the period of distribution, could not die without becoming entitled. *Jeyes v. Sarage*, 10 Ch. 555; see *Giles v. Giles*, 8 Sim. 360.

A substitutional gift must further be distinguished from those cases where an absolute gift is directed to be settled upon the donee for life, with remainder to his children. In the latter case the whole gift will fail by the death of the donee before the testator. *Stewart v. Jones*, 3 De G. & J. 532; *Whitcher v. Penley*, 9 B. 477.

Substitution distinguished from an absolute gift with a direction to settle.

On the other hand, a substitutional gift will take effect, though the original donee dies before the testator.

Thus, a direct gift to A. or his children goes to A. if he survives the testator, and to his children if he does not. *Montagu v. Nucella*, 1 Russ. 165; *Salisbury v. Petty*, 3 Ha. 86.

Direct gift to A. or his children.

Similarly, if there is a life interest, and then a gift to A. or his children, the substitutional gift takes effect whether A. dies in the lifetime of the testator or the tenant for life. *Girdlestone v. Doe*, 2 Sim. 225; *Porter's Trusts*, 4 K. & J. 188; *Habergham v. Ridehalgh*, 9 Eq. 395; *Hobgen v. Neale*, 11 Eq. 48.

Future gift to A. or his children.

As to the effect of the death of some of the original legatees before the testator:

It is settled that where the gift is to a class of parents, with a substitutional gift to the children of parents dying before the period of distribution, children of parents who die after the date of the will, and before the testator, will take. *Smith v. Smith*, 8 Sim. 353; *Jones v. Frewin*, 12 W. R. 369, 3 N. R. 415; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395.

Whether substituted legatees can take for original legatees who die before the testator's death.

Though, of course, if the original gift is to a class living at the testator's death, or at some other period, and the substitutional gift is expressly confined to the children of such persons, the substitution can have no effect with

Case where the original class is confined to persons living at

the testa-
tor's death.

regard to those who never become members of the original class. See *Shergold v. Bone*, 13 Ves. 370; *Smith v. Farr*, 3 Y. & C. Ex. 328.

Whether there can be substitution in respect of legatees dead at the date of the will :

Where the
original
gift is to
named
persons.

1. When there is a gift to several persons nominatim with a substitution of their issue in the event of their death, the fact that one of the persons so named is dead at the date of the will will not prevent his issue from taking. *Hannam v. Simms*, 2 De G. & J. 151; *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48; see *Barnes v. Jennings*, L. R. 2 Eq. 448.

Where the
original
gift is to a
class.

2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is whether the issue take a share which has been given to a parent who is contemplated as capable of taking under the will, or whether they take a share which has not been previously given to their parent. In the former case, issue of parents dead at the date of the will will not take, in the latter they will.

The important point is not whether the gift itself is substitutional, but whether the interests of persons who are contemplated as capable of taking under the will, are given in the event of their death to substituted legatees.

When the
substituted
legatees
take origi-
nal shares.

Thus, though a gift to such of a class as may be then living, or the issue of any then dead, is strictly substitutional, the issue, if they take at all, take original shares, since nothing is given to parents then dead. *Attwood v. Alford*, L. R. 2 Eq. 479.

In the same way a gift to parents "then living," and the issue of those then dead, is a direct substantive gift to the issue. *Smith v. Smith*, 5 Ch. 342; *Martin v. Holgate*, L. R. 1 H. L. 175; see *Ashling v. Knowles*, 3 Dr. 598; *Etches v. Etches*, 3 Dr. 447.

Gifts to
parents

a. If the gift is to parents and issue in one continuous

sentence—as, for instance, to children then living, and the issue of those then dead—the issue of parents deceased at the date of the will take, though the issue may be directed to take only a parent's share, as this direction will be satisfied by a stirpital distribution. *Tytherleigh v. Harbin*, 6 Sim. 329; *Rust v. Baker*, 8 Sim. 443; *Bebb v. Beckwith*, 2 B. 308; *Coulthurst v. Carter*, 15 B. 421; *Faulding's Trusts*, 26 B. 263; *Philp's Will*, 7 Eq. 151; *Heasman v. Pearse*, 7 Ch. 275.

then living,
and the
issue of
those then
dead.

But if the gift is to my children then living, and the children of such of my *said* children as shall be then dead, the testator by using the term “said” children shows that he is contemplating a class of children living at the date of the will, and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted. *Re Thompson's Trust*, 2 W. R. 218, 5 D. M. & G. 280; see *Peel v. Catlow*, 9 Sim. 372; *Smith v. Pepper*, 27 B. 86.

Effect of
the word
“said.”

On the other hand, if the gift is to brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. *Re Jordan's Trust*, 2 N. R. 57; see *Jarvis v. Pond*, 9 Sim. 549.

If the children are expressed to be the children of parents, who are beneficiaries under the will; if, for instance, the bequest is to “my daughters and their children,” the children of a daughter dead at the date of the will take nothing. *Parker v. Tootal*, 11 H. L. 143; see *Crook v. Whitley*, 26 L. J. Ch. 350; but see *Clay v. Pennington*, 7 Sim. 370.

Gift to my
daughters
and their
children.

b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the

When the
gift is sub-
stitutional

in the simplest form.

Where such of the original legatees as are alive at the date of the will do not satisfy the words of gift.

Where the gift to the substituted legatees is in an independent sentence.

Direction that the legacy of a parent should go to his children.

Issue to stand in the place of their parents.

Issue to take the share their parents would have been entitled to if living.

class dead at the date of the will, will not take. *Congreve v. Palmer*, 16 B. 435.

If, however, none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gowling v. Thompson*, 11 Eq. 366; see *Barnaby v. Tassell*, 11 Eq. 363.

c. Where the gift to the issue is in an independent clause, the question is whether the intention is to add fresh members to or substitute them for the original class.

If the gift is to children living at the testator's death, with a direction that if any should happen to die in his lifetime, the "legacy" intended for such child should be for his issue, the word legacy shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson v. Naylor*, 1 Mer. 320; *Hunter v. Cheshire*, 8 Ch. 751. It may be doubted whether *Phillips v. Phillips*, 13 W. R. 170, 10 Jur. N. S. 1173, and *Parsons v. Gulliford*, 10 Jur. N. S. 231, can stand with these authorities.

So, if there is no direct gift to issue, but only a direction that issue of parents dying are to stand in the place of their parents, or to take their parents' share. *Butler v. Ommaney*, 4 Russ. 71; *Gray v. Garman*, 2 Ha. 268; *Atkinson v. Atkinson*, 1 R. 6 Eq. 184; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395.

On the other hand, if the original gift is to a class, with a direction, that the issue of any dying in the testator's lifetime, or before the period of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word share being satisfied by a stirpi-

tal distribution. *Loring v. Thomas*, 1 Dr. & S. 497; *Chapman's Will*, 32 B. 382; *Adams v. Adams*, 14 Eq. 246.

In these cases it is not the share of the parents, or the share the parents are entitled to, which is given to the issue, but the share the parents would have been entitled to. *In re Potter's Trusts*, 8 Eq. 52, is a more difficult case since there the gift was to nephews and nieces, and in case of the death of any of his *said* nephews and nieces leaving issue, such issue to take the share their parents would have taken if living, the word *said* showing that the testator referred to nephews and nieces capable of taking under the will. See *Re Thompson's Trust*, 2 W. R. 218, 5 D. M. & G. 280.

Perhaps issue of parents dead at the date of the will would not be admitted where other express provision is made for such issue. *Waugh v. Waugh*, 2 M. & K. 41.

And where the gift is to children living at the decease of the tenant for life, followed by a direction, that if any *such* children should be dead before the tenant for life and leave issue, their issue should be entitled to the share of a child dying before the tenant for life, this is in effect a substantive gift to the issue since only children surviving the tenant for life are members of the original class, and the word *such* is inaccurately used. *Giles v. Giles*, 8 Sim. 360; see *Jarvis v. Pond*, 9 Sim. 549.

Whether the contingency of the original gift attaches to the substituted gift.

When there is a life interest followed by a contingent gift to certain persons, and a gift if they die before the contingency to their children, the contingency attaching to the gift to the parents does not attach to that to the children, and the children take vested interests, although they may not survive the contingency upon which the gift to the parents was to take effect. For instance, if

Contingency attaching to original legatees does not attach to substituted legatees.

the bequest is to A. for life, then to such of my nephews as may be then living, and the children of such as may be then dead, the children take vested interests upon their parent's death, whether they survive A. or not.

Where the substituted legatees take original shares.

1. This is clearly settled if the children take original shares. *Martin v. Holgate*, L. R. 1 H. L. 175; *Re Ortons' Trust*, 3 Eq. 375; *Burt v. Hillyar*, 14 Eq. 160.

Whether rule is the same with substitutional gifts.

2. But if the gift to the children is substitutional there appears to be some difficulty. On the whole, the current of recent authority seems to be in favour of the same rule in the case of substitutional as of original gifts. *Masters v. Scales*, 13 B. 60; *Re Turner*, 34 L. J. Ch. 660; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Merrick's Trusts*, L. R. 1 Eq. 551.

But a difficulty is created by the case of *Pearson v. Stephen* in the House of Lords, 5 Bl. N. S. 208. There there was a gift to S. during coverture, and upon the death of her husband in her life to her absolutely, but if her husband should survive her, then to the testator's five sons and their respective issue *per stirpes* and not *per capita*, and it was held that in the event of S. dying in her husband's life, the sons of the testator living at such event would be absolutely entitled, but if any of the sons should die in the lifetime of S. leaving issue, such issue, if living at the death of S., would be entitled to the share their parents would have taken; but see the remarks of Kindersley, V.-C., on this case in *Lanphier v. Buck*, 34 L. J. Ch. 659.

Substituted legatees in order to take must survive their ancestor.

3. There is, however, this difference between a substitutional and original gift to the children, that in the former case only those children who survive the parents will take, while in the latter all the children will take, whether they survive the parents or not; but see *Humfrey v. Humfrey*, 2 Dr. & Sm. 129. "The substitution takes place at the death of the nephew or niece. And then I

see very good ground for saying, there, by reason of its being substitution, you will not substitute dead people for the nephew or niece who has been living up to that time and has then just died." *Lanphier v. Buck*, 2 Dr. & Sm. 484, 34 L. J. Ch. 657; *Re Turner*, 34 L. J. Ch. 660; *Merrick's Trusts*, L. R. 1 Eq. 551; *Thompson v. Clive*, 23 B. 282; *Crause v. Cooper*, 1 J. & H. 207; *Bennett's Trusts*, 3 K. & J. 280; *Hurry v. Hurry*, 10 Eq. 346; *Hobgen v. Neale*, 11 Eq. 48; *Heasman v. Pearse*, 11 Eq. 522, 7 Ch. 275.

Whether the original and substituted class are mutually exclusive :

When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class.

Whether original and substituted legatees can take together.

It is clear that if all the original class survive the period of distribution, they alone take. *Sparks v. Restal*, 24 B. 218; *Margetson v. Hall*, 10 Jur. N. S. 89, 12 W. R. 334.

Where all the original legatees survive.

So, if none of the original class survive the period of distribution, the substituted legatees alone take. *Willis v. Plaskett*, 4 B. 208; *Timms v. Stackhouse*, 27 B. 434; *Bolitho v. Hillyar*, 34 B. 150; *Attwood v. Alford*, L. R. 2 Eq. 479.

Where none of the original legatees survive.

But if some of the original class die leaving children and others survive the period of distribution :

Where some original legatees die.

If the gift is to several persons nominatim as tenants in common or their children, those who survive the period of distribution take, together with the children of those who die before it. *Price v. Lockley*, 6 B. 180.

In the case, however, of a simple substitutional gift to

children or legal issue to be divided amongst them in equal shares after the death of their parents, it was held that the issue of a child dying after the testator and before the period of distribution, could not take with the other children. *Holland v. Wood*, 11 Eq. 91.

But in that case the substitution probably referred to the death of the testator, the period of division only being postponed, so that it is not, perhaps, an authority precisely in point. See *Blundell v. Chapman*, 12 W. R. 540; *Attwood v. Alford*, L. R. 2 Eq. 479; *Gowling v. Thompson*, 19 L. T. N. S. 242. *Finlason v. Tatlock*, 9 Eq. 258.

When the class of substituted legatees is to be ascertained.

How the class of substituted legatees is to be ascertained, when the gift is to A. for life, then to B. or his issue :

1. If B. dies in the testator's lifetime, the class is ascertained at the testator's death. *Ive v. King*, 16 B. 46.
2. If B. survives the testator and dies in the lifetime of the tenant for life, the class is ascertained at B.'s death. *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48.

And the class will be definitely ascertained at those periods, and will not open to let in issue born afterwards and before the period of distribution, on the principle that a person to take by substitution must be alive at the time when the substitution takes place. *Hobgen v. Neale*, *supra*.

CHAPTER XXVIII.

GIFTS TO SURVIVORS.

THE word survivor may be either a word of limitation of an estate, denoting the interest certain persons are to take, or it may denote a class of persons.

For instance, in a devise to A., B., and C. as tenants in common for life, with benefit of survivorship, the word survivorship refers to the extent of the estate and not to the class of persons, and upon the death of one the remaining tenants in common take the whole estate. *Haddelsey v. Adams*, 22 B. 266; *Taaffe v. Conmee*, 10 H. L. 64.

Survivor
used as a
word of
limitation
of an es-
tate.

The word cannot, of course, be a word of limitation where absolute interests are given. *Maberley v. Strode*, 3 Ves. 450.

The word is, however, more usually employed to denote the persons who are to take, and in such cases it must have its natural meaning, which is to outlive, that is to say, to be alive at and after the time of a particular event or death of a particular person, which event or person the other is to survive. *Gee v. Liddell*, L. R. 2 Eq. 341. See, however, *Re Clark's Estate*, 3 D. J. & S. 111, where "survive" was held to mean merely "live after."

Meaning of
survivor.

It has been held that a divesting clause in favour of survivors will operate in favour of a single survivor. *Hearn v. Baker*, 2 K. & J. 883.

WHERE SURVIVORS WILL BE READ OTHERS.

Gift to several, and if any die without issue, to the survivors.

1. If there is an absolute gift to several persons, with a gift to the survivors, if any die without issue, survivors must be construed in its ordinary sense. *Crowder v. Stone*, 3 Russ. 217; *Ranelagh v. Ranelagh*, 2 M. & K. 441. *Stead v. Platt*, 18 B. 50; *Greenwood v. Percy*, 26 B. 572.

Gifts to be paid at twenty-one, with a gift over if all die under twenty-one.

2. Where there is a gift over to take place only in case the event on which the property is limited to the first legatees, among whom there is to be survivorship, happens in respect of all the legatees, survivor will be construed other, so as not to cause an intestacy. For instance, if the bequests are to A., B., and C., payable at twenty-one, and if either die under twenty-one, his share to the survivors, and if two die under twenty-one, the whole to the survivor, and if all die under twenty-one, then over, the share of one dying under twenty-one would go to one who had predeceased him but attained twenty-one and to the survivor equally. *Wilmot v. Wilmot*, 8 Ves. 10; *In re Jackson's Trust*, 14 Ir. Ch. 472. The same construction was adopted in *In re Connellan's Trust*, 16 Ir. Ch. 524, though there was no gift, but *quære*.

In these cases the testator intends the property to go over as a whole, or not at all. As the whole cannot go over where the event does not happen in respect of all the first legatees, there is no other disposition of the shares in respect of which it happens except among the first legatees themselves, and, in order to allow them to take, the word survivor must be read other.

Survivorship between tenants in tail referred to the stirpes.

3. Where there is a devise to sons and the heirs of their bodies, and if any die without issue to the survivors and the heirs of their bodies, and if all die without issue over, survivorship will be referred to the stirpes and not to the first takers, and the share of a son dying

without issue will go among the issue of a son previously deceased and the surviving sons. *Doe v. Waineright*, 5 T. R. 427 ; *Smith v. Osborne*, 6 H. L. 376.

In such cases the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective stirpes and not between the first takers merely, and this, coupled with the gift over, which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.

It is immaterial whether the word is survivors or such as survive. *In re Tharp's Estate*, 1 D. J. & S. 453.

And the same construction will be adopted even if there is no gift over to interpret the testator's intention. *Harman v. Dickenson*, 1 B. C. C. 91, see 34 B. 352 ; *Williams v. James*, 20 W. R. 1010 ; *Tufnell v. Burrell*, 20 Eq. 194.

Gift over
is not
material.

4. The same will be the case where the will gives life estates with limitations expressly to issue, followed by a gift on failure of issue of any of the tenants for life to the surviving tenants for life for their lives and then to their issue and an ultimate gift over on failure of issue of all the tenants for life ; and it makes no difference whether the gift be to survivors for life and then to their issue, or to survivors in like manner as the original shares were given. *Lowe v. Land*, 1 Jur. 377 ; *In re Keep's Will*, 32 B. 122 ; *In re Tharp's Estate*, 1 D. J. & S. 453 ; *Holland v. Allsop*, 29 B. 498 ; *Hurry v. Morgan*, L. R. 3 Eq. 152 ; *Badger v. Gregory*, 8 Eq. 78 ; *Waite v. Littlewood*, 8 Ch. 70 ; *In re Palmer's Trusts*, 19 Eq. 320 ; *Wake v. Varah*, 2 Ch. D. 348.

Gifts for
life re-
mainder to
issue, and
if any die
without
issue, to
the survi-
vors for
life, and
then to
their issue.

There is here the same evidence of intention to benefit the issue, and the gift over shows that survivorship is contemplated, not merely between the first takers but between the respective stirpes.

Gift over
is imma-
terial.

The same construction will, however, be adopted even in the absence of a gift over. *Hodges v. Foot*, 34 B. 349; *Re Beck's Trusts*, 16 W. R. 189; 37 L. J. Ch. 233; *In re Arnold's Trusts*, 10 Eq. 252. See, however, *Milsom v. Awdrey*, 5 Ves. 465; *Re Corbett's Trusts*, Johns. 591; the latter case might, perhaps, be supported on the ground that the testator expressly provided for the surviving issue of the children of the tenants for life, thus excluding an intention of also providing for children of tenants for life dying before the period of accruer, besides which the case was one in which absolute gifts were subsequently cut down by settlement.

Effect of
gift over
after the
death of
the sur-
vivor.

If accruing shares are given to the survivors or survivor for their joint lives, and after the decease of the survivor to the children of the survivors or survivor, the surviving tenant for life will take the whole for life, though probably the children of predeceasing tenants for life would take on his death. *Winterton v. Crawford*, 1 R. & M. 407.

When the
gift to sur-
vivors is
not sub-
ject to the
same limi-
tations as
the original
gift.

5. But if the gift to survivors is not given in the same manner as the original shares, there is no evidence that stirpital survivorship was intended, and the word will be construed strictly.

Thus, where the prior limitations being for life with remainder to children, the gift is to survivors absolutely and not to survivors for life, and then to their children, although there is a gift over of the whole upon death of all without issue, the intention to benefit the lines of issue is not sufficiently indicated and survivors will be construed strictly, *Twist v. Herbert*, 28 L. T. N. S. 489. *À fortiori*, where there is no gift over. *Leeming v. Sherratt*, 2 Ha. 14; *Lee v. Stone*, 1 Ex. 674; *Re Corbett's Trusts*, Johns. 591, the residuary gift. *Browne v. Rainsford*, 1 R. 1 Eq. 384.

General

In such a case, however, there may be a general

intention expressed to benefit the stirpes and not merely the surviving parents; for instance, by a preliminary statement of intention that the property in question is to be divided among the children of several parents, without any mention of survivorship between the parents. *Hawkins v. Hamerton*, 16 Sim. 410.

6. It seems when the original limitations are for life, with remainder to children in tail, and if any of the tenants for life die without children to the surviving tenants for life in tail, followed by a gift over in case of a total failure of issue of all the tenants for life, the stirpital construction would not be adopted. See *Maden v. Taylor*, 45 L. J. Ch. 569. See, however, *Cooper v. Macdonald*, 16 Eq. 258.

7. When absolute interests are given to a class of children in the first place, and the shares of daughters are afterwards directed to be settled upon them for their lives, with remainder to their issue, and if any die without issue to the survivors, not merely of the daughters but of the whole class of children, though the accruing shares of the daughters may be given subject to the same limitations as the original shares, survivors will be construed strictly. *De Garagnol v. Liardet*, 32 B. 608; *Re Usticke*, 35 B. 338. See *Nevill v. Boddam*, 28 B. 554.

8. Upon similar principles if there is an absolute gift to several, with a gift to their issue if they die leaving issue, and if any die without issue to the survivors, subject to the same executory limitation in favour of issue as the original shares, survivorship will be referred to the stirpes, and not merely to the individuals. *Eyre v. Marsden*, 2 Kee. 564, 4 M. & Cr. 231; *Cross v. Maltby*, 20 Eq. 378; see *Le Jeune v. Le Jeune*, 2 Kee. 701.

But if the gift to survivors is absolute and not subject to the same defeasibility in favour of issue as the original shares, survivors must be construed strictly, though there

intention
to benefit
stirpes.

Effect of
gift to
parents for
life, re-
mainder to
children in
tail, and if
any parents
die without
children,
to the sur-
viving
parents in
tail.

Where the
shares of
daughters
are direc-
ted to be
settled
with a gift
over if they
die without
children to
the survi-
ving sons
and
daughters.

Gift over
to survi-
vors sub-
ject to the
same
defeasi-
bility as
the original
gift.

may be a gift over in the event of the death of all the legatees without issue. *Ferguson v. Dunbar*, 3 B. C. C. 468 n.

AT WHAT PERIOD A CLAUSE OF SURVIVORSHIP CEASES TO OPERATE.

In gifts to survivors two further questions arise ; in the first place, when is the class of survivors to be ascertained ? in the second place, when do the interests become indefeasible ?

The period of distribution is the limit of defeasibility.

1. The general rule is that, when the survivorship is upon death merely, the time of distribution is the limit of defeasibility. "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy." *Cripps v. Woolcott*, 4 Mad. 11 ; *Stevenson v. Gullan*, 18 B. 590 ; *Neathway v. Read*, 3 D. M. & G. 18 ; *Howard v. Collins*, 5 Eq. 349.

This is the case whether the only gift is in the direction to divide, as in *Cripps v. Woolcott*, or whether there is already a prior complete gift independent of that direction. *Hearn v. Baker*, 2 K. & J. 383.

The same rule applies to realty as to personalty. *In re Gregson's Trust Estate*, 2 D. J. & S. 428.

If the tenant for life dies in the lifetime of the testator the survivors are fixed at the testator's death. *Spurrell v. Spurrell*, 11 Ha. 54 ; *Daniell v. Daniell*, 6 Ves. 297.

Direct gift to several or the survivors.

a. Thus, in the case of a direct gift to several or the survivors, those who survive the testator take the whole. *Spurrell v. Spurrell*, 11 Ha. 54, 17 Jur. 755.

If payment is postponed till the age of twenty-one, sur-

vivorship refers to that. *Forrester v. Smith*, 2 Ir. Ch. 70 ; *Vorley v. Richardson*, 8 D. M. & G. 126.

b. If there is a gift for life, followed by a gift to several or the survivors, or by a gift to several, and if any die, to the survivors, those who survive the period of distribution take indefeasibly. *Cripps v. Woolcott*, 4 Mad. 15 ; *Whitton v. Field*, 9 B. 369 ; *Naylor v. Robson*, 34 B. 571 ; *Vorley v. Richardson*, 8 D. M. & G. 126 ; see *Wordsworth v. Wood*, 1 H. L. 129.

Future gift to several or the survivors.

c. In the same way, if there is a gift for life, and then to the children of the tenant for life who attain twenty-one, and in default of such children to a class of survivors, the survivorship refers to the period when the prior gift fails. *Macdonald v. Bryce*, 16 B. 581 ; *Carrer v. Burgess*, 18 B. 541, 7 D. M. & G. 96 ; *Taylor v. Beverley*, 1 Coll. 108.

Gift upon a contingency to a class of survivors.

d. Upon the same principle, a gift after a life interest to "surviving children" goes to those who survive the tenant for life. *Huffam v. Hubbard*, 16 B. 579 ; *Stevenson v. Gullan*, 18 B. 590 ; *Thompson v. Thompson*, 29 B. 654 ; *Neathway v. Read*, 3 D. M. & G. 18.

Gifts to "surviving" children refer to the period of distribution.

So if there are several life interests followed by a gift to a class of survivors, they are ascertained at the death of the last tenant for life. *Re Fox's Will*, 35 B. 163.

But if the class of survivors are the children of one of the tenants for life, perhaps they would be fixed at the death of their parent. *Drakeford v. Drakeford*, 33 B. 43.

And if after a gift to surviving children there is a limitation giving the shares of such of the said children who die without issue before the tenant for life to survivors, the original limitation to surviving children must refer to those who survive the testator. *Evans v. Evans*, 25 B. 81 ; see *Stringer v. Phillips*, 1 Eq. Ab. 293, pl. 11, 1 P. Wms. 97 n.

Contrary intention.

2. The ordinary rule may, however, be excluded by the language of the will.

Effect of powers of advancement in limiting survivorship to the testator's death.

Thus, if the testator provides for the children of legatees between whom there is to be survivorship only in case they do not survive him, or gives large powers of making advances during the lifetime of the tenant for life to legatees among whom there is to be survivorship, it may appear that survivors were to be determined at his death. *Rogers v. Towsie*, 9 Jur. 575; *Blackmore v. Snee*, 1 De G. & J. 455.

Effect of words of limitation.

And, perhaps, if the gift to survivors is followed by words of limitation, such as executors and administrators or assigns, the argument that a personal enjoyment by the survivors was not intended might prevail, and survivorship would be referred to the death of the testator. *Rose d. Vere v. Hill*, 3 Burr. 1881; *Wilson v. Bagly*, 8 B. P. C. 195.

At any rate, this would clearly be the case if the gift is after a life interest to surviving children, or their heirs and assigns, where the substitutional gift shows that vested interests were intended to be taken at the testator's death. *Re Hopkins' Trust*, 2 H. & M. 411.

Gifts to be paid at twenty-one, after a life interest, with benefit of survivorship.

3. If there is a life interest and a period of division as well, for instance, a gift to A. for life, then to a class to be paid at twenty-one, with a clause of survivorship, the question is more complicated. In such cases survivorship refers most naturally to the words with which it is placed in immediate connection.

a. Therefore, if the gift is after a life interest to a class to be paid at twenty-one with benefit of survivorship, survivorship refers most naturally to the age of twenty-one just before mentioned. *Tribe v. Newland*, 5 De G. & S. 236; *Knight v. Knight*, 25 B. 111; *Forrester v. Smith*, 2 Ir. Ch. 70; *Berry v. Briant*, 2 Dr. & Sm. 1; *Corneck v. Wadman*, 7 Eq. 80.

This construction is assisted by a gift over upon death of all under twenty-one. *Salisbury v. Lamb*, 1 Ed. 465, Amb. 383; *Bouverie v. Bouverie*, 2 Ph. 349; *Alty v. Moss*, 34 L. T. N. S. 312.

Effect of a gift over upon death of all under twenty-one.

On the other hand, it is rebutted if the gift over is upon death of all before the tenant for life. *Daniell v. Gossett*, 19 B. 478; *Fisher v. Moore*, 1 Jur. N. S. 1011; see, too, *Doe d. Lifford v. Sparrow*, 13 East, 359; *Gummoe v. Howes*, 23 B. 184, 192.

Gift over upon death before the tenant for life.

b. If, however, the direction as to payment is independent of the gift to survivors, the ordinary rule prevails; if, for instance, the gift is to surviving children at twenty-one. *Huffam v. Hubbard*, 16 B. 579; *Pope v. Whitcombe*, 3 Russ. 124; *Crozier v. Fisher*, 4 Russ. 398; *Lill v. Lill*, 23 B. 446; *Daniell v. Gossett*, 19 B. 478.

Where the ordinary rule prevails.

4. If the gift to survivors is upon death without issue, and the bequest is immediate, the period of defeasibility will not be limited in the absence of a contrary intention, and the gift to the survivors is good whenever the deaths without issue may occur. *Bowers v. Bowers*, 5 Ch. 244; see, however, the remarks of V.-C. Malins on this case, 11 Eq. 231.

When the gift to survivors is upon death without issue.

And apparently the same rule will apply if there is a life interest. *Ingram v. Soutten*, L. R. 7 H. L. 408.

WHEN THE CLASS OF SURVIVORS IS TO BE ASCERTAINED.

1. In the class of cases last mentioned where the gift is upon death without issue, the survivors are ascertained whenever the event, upon which the shares are given over, occurs. *Leeming v. Sherratt*, 2 Ha. 14; *Nevill v. Boddam*, 28 B. 554; *Maden v. Taylor*, 45 L. J. Ch. 569.

When the gift is upon death without issue, the survivors are ascertained when the event happens.

2. Whether the last survivor would take indefeasibly seems doubtful.

It has been held that when interests are given to several persons for life with remainder to their children

Whether the last survivor

takes inde-
feasibly.

and in the event of any of them dying without issue, the shares of those so dying are given to the survivors absolutely, in the event of the last survivor dying without issue, such last survivor will take his share absolutely, the share being carried back to him by the survivorship clause. *Maden v. Taylor*, 45 L. J. Ch. 569. The difficulty of this construction is that it reads survivors in two different senses. The share of a legatee dying without issue and leaving several survivors would go to them—that is to say, to those who survive the event; on the other hand, the share of the last surviving legatee dying without issue is carried back to him not as surviving the event, but as the longest liver. See *Re Bates*, 11 W. R. 768, and *Re Corbett's Trusts*, Joh. 591, where, in similar cases, it was held that there was an intestacy as to the share of the last survivor. It may be noticed that no cases bearing on this point appear to have been cited in *Maden v. Taylor*, and the suit being a friendly one the question seems hardly to have been argued by counsel.

Whether,
when the
period of
defeasi-
bility is
expressly
limited by
the testa-
tor, sur-
vivors are
ascertained
when the
event hap-
pens, or
when the
shares be-
come inde-
feasible.

When
there is no
vested gift.

Divesting
gift to sur-
vivors upon
death
merely.

3. In those cases where the period of defeasibility, or the period during which the gift to survivors is to take effect is limited, another difficulty arises with regard to the time at which the class of survivors is to be fixed. The question is whether the shares of those dying go over immediately to survivors, or whether only those can take as survivors, who survive the period of defeasibility.

a. If there is no vested gift, but only a gift to survivors after a life interest, or upon a contingency, there is no difficulty, and the class to take is ascertained at the time of division, or when the contingency happens. *Howard v. Collins*, 5 Eq. 349; *Carver v. Burgess*, 18 B. 541, 7 D. M. & G. 96; *Pritchard's Trusts*, 3 Dr. 163.

b. When there is a vested gift with a divesting clause in favour of survivors upon death merely, as, for instance, to a class, and if any die to the survivors, the class to

take will be ascertained at the time when the shares become indefeasible, that is to say, at the time of distribution, so that if there are no survivors at that time the original gifts are not divested. *Cambridge v. Rous*, 25 B. 409.

c. But when the gift is to a class, with a gift to survivors, if any die before the tenant for life or before the period of distribution, so that no question as to the period of defeasibility can arise :

Gift to survivors if any legatees die before the period of distribution.

(i.) If the gift is direct to be paid at twenty-one, and if any die under twenty-one, to the survivors as tenants in common, the current of authority seems to show that the share of a legatee dying under twenty-one will go to those who survive him, though such survivors may not survive the period of distribution, or even the testator where the gift is to individuals, in which latter case the accrued share will lapse. *Ex parte West*, 1 B. C. C. 575; *Rickett v. Guillemard*, 12 Sim. 88; see, too, *Rudge v. Barker*, Ca. temp. Talb. 124, and cases there cited; *Worlidge v. Churchill*, 3 B. C. C. 465; *Pain v. Benson*, 3 Atk. 80; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Bardon v. Bardon*, 16 Ir. Ch. 415; see *Wakefield v. Dyott*, 7 W. R. 31, 4 Jur. N. S. 1098.

Direct gift to be paid at twenty-one, and if any die under twenty-one, to the survivors.

(ii.) If the gift is after a life interest to several, and if any die before the tenant for life to the survivors as tenants in common, it appears to be now settled that survivors means those who survive the tenant for life, and therefore those who survive the tenant for life will take the whole, while, on the other hand, if none survive the tenant for life the prior interests are not divested. *Littlejohns v. Household*, 21 B. 29; *Marriott v. Abell*, 7 Eq. 478; see *Hunter's Trusts*, L. R. 1 Eq. 295. *Bright v. Rowe*, 3 M. & K. 316 if *contra*, must be considered overruled. It may, however, perhaps be classed under the preceding head, as the disposition was not of a fund in

Future gift to several, and if any die before the tenant for life, to the survivors.

possession to a tenant for life with remainder, but of a reversionary fund subject to a prior life interest, to be paid upon its falling in. See, too, *Forley v. Richardson*, 8 D. M. & G. 126.

When survivorship will be among the legatees.

(iii.) The testator may, however, show that he intended survivorship to be between the legatees, and not to have reference to the period of distribution.

If, for instance, the gift is to A. for life, and then to B. and C. equally, and if either die in A.'s life to the survivor of them the said B. and C., *his executors, administrators, or assigns*, there is a strong indication that the survivorship intended was between B. and C., and, therefore, upon B.'s death in A.'s life, C. immediately becomes entitled in remainder to the whole. *White v. Baker*, 2 D. F. & J. 55.

Gift to survivors if any legatees die without issue before the period of distribution.

d. If the gift is if any die without issue before the period of distribution to survivors, the point seems to be more doubtful.

When there is a gift to the issue if any die leaving issue.

(i.) If there is a gift in the event of any dying before the period of distribution leaving issue to such issue, and if any die before the period of distribution without issue to the survivors, since the gift to the issue takes effect upon the death of the parent, survivorship refers to the same point of time, namely, the death of the person dying without issue. *Ive v. King*, 16 B. 46; *Eyre v. Marsden*, 2 Kee. 564, 4 M. & Cr. 231; *Wilmott v. Flewitt*, 13 W. R. 856, 11 Jur. N. S. 828.

Where the original gift is to a class living at the period of distribution.

(ii.) On the other hand, if the original gift is to a class living at the period of distribution, it seems more natural to refer the survivorship to the same period. *Essex v. Clement*, 30 B. 525.

Where the whole fund is to be divided once for all.

(iii.) And, perhaps, the same will be the case where the gift is not of the shares of those dying before the period of distribution without issue to survivors, but the whole fund is directed to be divided in the event

of any dying before the period of distribution among the survivors, implying that the whole fund is to be kept together till the period of distribution, and then divided among a class of persons capable of personal enjoyment. *Watson v. England*, 15 Sim. 1. See *Re Johnson's Trusts*, 10 L. T. N. S. 455.

(iv.) Where there are none of the indications of intentions above mentioned, it seems doubtful what the rule would be. *Crowder v. Stone*, 3 Russ. 217; and *Young v. Robertson*, 4 Macq. 314, appear to be in direct conflict on the point, and the latter being a Scotch case, it is difficult to say how far its authority would be followed, especially as it is in other respects not entirely in harmony with the current of English authority. As far as principle or convenience goes the arguments seem to be fairly balanced.

Crowder v. Stone, and Young v. Robertson.

A gift over upon death without issue means death without issue at any time, in the absence of an indication of intention to limit the period of defeasibility. The class of survivors, therefore, would have to be fixed whenever the contingency happens, and there seems no reason for saying that the mere limiting of the period of defeasibility should introduce a contingency into the bequest to survivors and make the gift of accruing shares conditional upon surviving the period of defeasibility.

The gift over to survivors, being upon death without issue, it is the failure of issue of members of the original class which is the leading motive in the testator's mind, and not death before the period of enjoyment. The share is given to survivors not because the original members of the class do not live to enjoy it, but because they have no children to benefit. The intention is to benefit not only the original class but their children, whereas, if the survivors are not fixed till the time when the shares become indefeasible, children of such members

of the original class as die before that time will take no interest in the shares of those who die without issue, an argument which, as already remarked, becomes conclusive if there is a prior gift to the children of those who die leaving children.

On the other hand, if the shares go over at once, and several die without issue in the lifetime of the tenant for life, the representatives of the longer lived will take more than the representatives of those dying previously, while the representatives of the person dying first will take nothing, and it may be said that this can hardly have been the testator's intention; but he would probably have provided for such a contingency if he had contemplated it, and his omission to do so ought not to affect the construction of the will.

On the whole, however, it must be admitted that the balance of recent authority is in favour of the principle adopted in *Young v. Robertson*. See the opinion of the V.-C. Malins, 7 Eq. 483, 484.

Case when
the period
of defeasibility
is
constructively
limited.

d. What the case would be when, the gift being upon failure of issue of any of the legatees to the survivors, the Court limits the period of defeasibility by construction to the lifetime of the tenant for life there is no authority to show. In such a case it would seem the argument above mentioned in favour of immediate accruer would apply with greater force, as the period of defeasibility is only remotely present to the testator's mind.

ACCRUED SHARES.

Accrued
are not
subject to
the defeasibility
of
original
shares
without

Clauses in a will disposing of the shares of devisees and legatees dying before a given period or event, do not without a positive and distinct indication of intention extend to shares which have once accrued under those clauses so as to pass them a second time. *Ex parte*

West, 1 B. C. C. 575; *Melsom v. Giles*, L. R. 5 C. P. 614; *ib.* 6 C. P. 532; *ib.* 6 H. L. 24. express words.

Therefore accrued shares will not pass under the word share or portion. *Cambridge v. Rous*, 25 B. 416; *Bright v. Rowe*, 3 M. & K. 316.

But accrued shares will go with original shares if there is an intention expressed that they should do so.

1. If, for instance, accrued shares are directed to go in the same manner as original shares. *Cursham v. Newland*, 2 B. 145; *Milsom v. Awdry*, 5 Ves. 465; *Eyre v. Marsden*, 4 My. & Cr. 231; *Melsom v. Giles*, L. R. 6 H. L. 24. Accrued shares directed to go as original shares.

2. And when original and accrued shares have once been consolidated by a direction, for instance, that they are to go in the same manner, "there is no occasion to carry on any separate account of the original share from the accrued share," and both will pass under the word share. *Re Hutchinson*, 5 De G. & S. 681. Consolidation of original and accrued shares.

3. If "his or her share or shares" are spoken of where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*, as might be the case if the words were "his, her, or their share or shares." *Wilmott v. Flewitt*, 13 W. R. 856. Words applicable to accrued shares.

And, apparently, "share and shares and interest," would carry accrued shares. *Douglas v. Andrews*, 14 B. 847.

4. Accrued shares will pass where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the period of distribution as an aggregate and previously undivided fund by speaking of it, for instance, as the trust fund. *Worlidge v. Churchill*, 3 B. C. C. 465; *Leeming v. Sherratt*, 2 Ha. 14; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Barker v. Lea*, T. & R. 413. Where the fund is treated as an aggregate fund.

So, where the whole fund is given to a class, with benefit of survivorship, the words of survivorship apply to the whole, accrued as well as original shares. *In re Crawhall's Trusts*, 2 Jur. N. S. 892.

Gift over
of the
whole
fund.

5. And a gift over of the whole is convincing evidence of the same intention. In such a case "share must have been meant to include every interest accruing as well as original, for otherwise the estate would go away from the issue piecemeal, whereas, it is obvious, nothing was intended to go over, but that all should go over at once on failure of the issue of all the children, as if all but one had died without issue who was intended to take all." *Doe d. Clift v. Birkhead*, 4 Ex. 110; *Douglas v. Andrews*, 14 B. 347; *Dutton v. Crowdy*, 33 B. 272.

Where the
gift is
residuary.

6. And if the bequest is of residue, the presumption against intestacy will assist the Court in passing accrued with original shares. *Goodman v. Goodman*, 1 De G. & Sm. 695.

Accrued
shares are
prima
facie not
subject to
the restric-
tion of
original
shares.

7. Accrued shares are similarly not liable to the same restrictions as original shares in the absence of a clearly expressed intention so to restrict them. *Gibbons v. Langdon*, 6 Sim. 260; *Ware v. Watson*, 7 D. M. & G. 248; and, on the other hand, *Trickey v. Trickey*, 3 M. & K. 560; *Jarman's Trusts*, L. R. 1 Eq. 71.

CHAPTER XXIX.

THE CONSTRUCTION OF GIFTS OVER.

GIFTS OVER UPON DEATH BEFORE VESTING.

A GIFT over of the share of a legatee who dies before attaining a vested interest takes effect if the legatee dies in the lifetime of the testator, whether under or over the age appointed for vesting. *Re Gaitskell's Trusts*, 15 Eq. 386.

Gift over upon death before vesting takes effect on the share of a legatee dying before the testator.

A gift over upon the death of the legatees before attaining a vested interest, refers *prima facie* to death before vesting in interest.

Vesting *prima facie* refers to vesting in interest.

This is the case whether the gift be immediate or in remainder. *Parkin v. Hodgkinson*, 15 Sim. 293; *Re Arnold's Estate*, 33 B. 163; *Richardson v. Power*, 19 C. B. N. S. 780.

If, however, the gift over be to persons living at the period of distribution there is a strong argument that the word vested was used as equivalent to vested in possession: *Young v. Robertson*, 4 Macq. 814, where the gift over upon the death of any before attaining a vested interest was to the survivors, which was read as equivalent to those who survive the period of distribution, and *Greenhalgh v. Bates*, L. R. 2 P. & D. 47, where the gift over was to the next of kin of the tenant for life, who could not be ascertained till her death.

When the gift over to persons living at the period of distribution.

So, if the legacies would be vested in interest at the

testator's death and the gift over is, if any of the legatees die during the testator's life, or after his decease, without attaining vested interests, vested must mean vested in possession. *King v. Cullen*, 2 De G. & S. 252.

Vested
used as
equivalent
to paid.

And, in the same way, the testator may show that he used "vested" in the gift over, as equivalent to "paid," if the gift over is, if any die before their share should be vested as aforesaid, when only directions as to payment have been previously given. *Sillick v. Booth*, 1 Y. & C. C. 121, 126.

GIFTS OVER UPON DEATH BEFORE PAYMENT.

Gift over
upon death
before pay-
ment after
an imme-
diate gift
with a
period of
payment.

A. In the case of a direct gift, followed by a gift over, if any of the legatees die before their legacies are payable.

1. If a period for payment is appointed the gift over takes effect :

a. If the prior legatee dies in the testator's lifetime, whether after the age fixed for payment or not. *Walker v. Main*, 1 J. & W. 1 ; *Gaitskell's Trust*, 15 Eq. 886.

b. If the prior legatee survives the testator, but dies before the time fixed for payment. *Jenkins v. Jenkins*, Belt's Supplement, 264 ; *Rammell v. Gillow*, 9 Jur. 704 ; and see *Woodburne v. Woodburne*, 8 De G. & S. 648.

Where no
period for
payment is
appointed.

2. If no time is fixed payable refers to the testator's death. *Rammell v. Gillow*, 9 Jur. 704 ; *Collins v. Macpherson*, 2 Sim. 87 ; *Cort v. Winder*, 1 Coll. 820.

Gift over
upon death
before pay-
ment
where there
is a life
interest.

B. If there is a life interest, followed by a bequest to certain persons, and a gift over in the event of death before the respective legacies become payable, no time being appointed for division or payment, the gift over takes effect with respect to those legatees who die before the tenant for life. *Crowder v. Stone*, 3 Russ. 217 ; *Creswick v. Gaskell*, 16 B. 577.

The word entitled, however, is more easily susceptible of the meaning vested than the word payable, and it will accordingly be taken to mean entitled in right and not in possession and referred to the death of the testator and not of the tenant for life, if the latter meaning would have the effect of divesting a previously vested gift. See *Commissioners of Charitable Donations v. Cotter*, 2 D. & Wal. 615, 1 D. & War. 498; *Henderson v. Kennicott*, 2 De G. & S. 492. See *Beale v. Connolly*, 1. R. 8 Eq. 412; *Jopp v. Wood*, 28 B. 53, 2 D. J. & S. 323.

Meaning of the word "entitled."

C. If there is a life interest as well as a period of payment the question is more complicated.

The most numerous cases on this head have occurred in marriage settlements, where, in addition to the leaning in favour of vesting, the Court is assisted by the legal presumption that the children were intended to be provided for at the time when their portions were wanted; whether they survived the tenant for life or not. See *Emperor v. Rolfe*, 1 Ves. sen. 208.

Effect of gift over upon death before payment when there is a life interest and a period of payment.

The same rules of construction are however applicable to wills.

1. Thus if there is a gift to A. for life, followed by a bequest to his children, whether at twenty-one, or payable at twenty-one, with a gift over on death before the legacy is payable, the gift over is good as regards legatees who die in the testator's lifetime, whether under or over twenty-one: *Walker v. Main*, 1 J. & W. 1; the share of Mary Main, who it appears had attained twenty-one. See *Gaitskell's Trust*, 15 Eq. 386.

Effect of the death of the legatee before the testator.

2. If there is a gift to A. for life followed by a contingent bequest to his children, as, for instance, to the children at twenty-one, or to be vested at twenty-one, and a gift over in the event of death before the shares are payable, if the word payable were taken in its

Bequest contingent upon attaining twenty-one is indefeasible at that age.

ordinary meaning as referring to the time at which the money is actually distributable, it would involve the double contingency of surviving the tenant for life and attaining twenty-one, and therefore the Court confines it to the latter, which is the event when the bequest is most likely to be required, and this is the case whether there is provision for the issue of the children or not. *Mendham v. Williams*, L. R. 2 Eq. 396; *Mocatta v. Lindo*, 9 Sim. 56; *Jones v. Jones*, 13 Sim. 561; *Bouverie v. Bouverie*, 2 Ph. 349.

The same will be the case whether the word used is "received" or "receivable:" *West v. Miller*, 6 Eq. 59; *Dodgson's Trust*, 1 Dr. 440; or "entitled in possession," or "entitled to the receipt," or "entitled to payment," or "before they have received or become possessed." *Re Yates' Trust*, 21 L. J. Ch. 281; *Haward v. James*, 28 B. 523; *Re Williams*, 12 Beav. 317; *Rammell v. Gillow*, 9 Jur. 704.

Effect of gift over to issue of those dying before the time of payment, when the shares are to be vested at marriage.

3. When the shares of daughters are directed to be vested at twenty-one, or marriage, and there is a gift over, if any of the legatees die before their shares are payable to their issue, there seems to be some doubt whether it would not be necessary to construe "payable" in its ordinary meaning, since a daughter could not die leaving issue before her share becomes payable if "payable" meant "vested."

It seems, however, that if the gift over is simply of the shares of legatees who die before the time of payment, the construction would not be affected by this fact. *Mendham v. Williams*, L. R. 2 Eq. 396.

On the other hand, if the gift over is not simply of their shares, but of the shares, to which the parents would have been entitled if living, since the parents would have been entitled to nothing unless they survived the period of vesting, and the daughters could not have

had issue without taking vested shares, payable will have its literal meaning. *Day v. Radcliffe*, 24 W. R. 961.

Probably, however, *Mendham v. Williams*, and *Day v. Radcliffe*, cannot stand together.

4. Where the gift to the children is vested at birth and payment only is postponed and there is no provision for the issue of the children, and a gift over in the event of death before the shares become payable: as, for instance, to A. for life and then to his children, to be divided at twenty-one, with a gift over if any die before their shares are payable, in this case payable will be held to mean attaining twenty-one, for otherwise the issue of those children would not take who died in the lifetime of the tenant for life over twenty-one. *Hallifax v. Wilson*, 16 Ves. 168; *Walker v. Main*, 1 J. & W. 1; *Salisbury v. Lamb*, 1 Ed. 465; *Re Williams*, 12 B. 317; *Hayward v. James*, 28 B. 523.

Where there is a vested gift to be paid at twenty-one.

The construction will be the same where the issue only of such children are provided for as die under twenty-one. *Mocatta v. Lindo*, 9 Sim. 56.

If, however, there is after a bequest for life a bequest to children vested at their births, and the time of division is alone postponed with provision for the issue of children dying at any time during the life of the tenant for life, and a gift over if they die before the legacies become payable, the word payable will bear its ordinary meaning and refer to the death of the tenant for life.

When the issue of those dying before the period of distribution are provided for in all events.

For instance, if the gift be to A. for life, then to her children, to be transferred to them at twenty-one, and if any die before their shares are payable, leaving issue, to such issue, and if any die before their shares are payable without issue over, since the fund becomes actually payable on the death of the tenant for life, and there is no reason to adopt any other construction in order to

favour the issue, who are already provided for, the gift over will be good on the death of the legatees during the life of the tenant for life, though they may have attained twenty-one. *Willmott's Trust*, 7 Eq. 532; *Chell v. Chell*, 23 W. R. 252.

Effect of the collocation of words upon the construction.

It may, however, be noticed that the construction of payable, as meaning attaining twenty-one, especially in cases under the first head, is materially assisted by such words as "to be paid," or "payable" at twenty-one, and "it is no strain to understand the testator as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment." *Hallifax v. Wilson*, 16 Ves. 168.

When the original gift is contingent upon surviving the tenant for life, "payable" bears its ordinary meaning.

5. If the death of the tenant for life is the earliest period at which the gift can be payable, if, for instance, the gift is to such as survive the tenant for life, to be paid at twenty-one, with a gift over upon death before the shares become payable, the word payable would in all probability receive its ordinary meaning and be referred to the period of distribution. *Bielefield v. Record*, 2 Sim. 354.

GIFTS OVER UPON DEATH BEFORE ACTUALLY RECEIVING THE LEGACY.

Gift to persons living at the testator's death, with a gift over upon death before payment.

When it is clear that the testator refers only to legatees living at his death, and there is a gift over if any die before their shares are payable, or before receiving their shares, the gift over cannot refer to death in the lifetime of the testator. V.-C. Kindersley, in such a case, held that the gift over was good with regard to the shares of those who died within a year after the testator's death; but, apparently, in such a case, the Court would inquire at what time the money might have been paid. *Arrow-smith's Trusts*, 29 L. J. Ch. 775, 6 Jur. N. S. 1231 on appl., 2 D. F. & J. 474.

If, however, the gift over is in the event of death before the legacy is actually paid or received, there is some doubt whether the gift over will take effect. See *Hutcheon v. Mannington*, 1 Ves. jun. 366, and *Martin v. Martin*, L. R. 2 Eq. 404.

Gift over
upon death
before
actual re-
ceipt.

According to the earlier authorities it seems that, though the Court will be unwilling to put upon any words a meaning which would divest a previously vested gift if the legatee dies before actually receiving it, nevertheless, where such an intention is clearly expressed, effect must be given to it. See *Gaskell v. Harman*, 11 Ves. 497.

“ If a testator thinks proper, whether prudently or not, to say distinctly, shewing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed. But that would open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon v. Mannington*, I admit, I thought the meaning of those words was, what they shall have received ; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him.” Thus, for instance, as already noticed, death before receiving will not mean before actually receiving, but before being entitled to receive. See, too, *Whiting v. Force*, 2 B. 571 ; and see *In re Kirkbride's Trusts*, L. R. 2 Eq. 400.”

But even when the gift over is upon death before actual receipt, the negligence of an executor will not be allowed to prejudice the legatee, and an inquiry will be directed as to the time at which, with reasonable diligence, the legacy ought to have been paid. *Law v. Thompson*, 4 Russ. 92 ; *Whitman v. Aitken*, L. R. 2 Eq. 414. But see

Negligence
of executor
will not
prejudice
the legatee.

Martin v. Martin, Ib., 404; *Minors v. Battison*, 1 App. C. 429, according to which cases it is extremely doubtful whether a gift over upon death before actually receiving a legacy would not now be considered void for uncertainty.

GIFTS OVER UPON DEATH UNMARRIED AND WITHOUT ISSUE.

Gift over upon death unmarried and without issue when vested interests are given upon marriage.

1. Where vested interests are given at twenty-one, or marriage, a gift over upon death unmarried and without issue will mean never having been married. *Heywood v. Heywood*, 29 B. 9; *Pratt v. Matthew*, 8 D. M. & G. 522; *Gonne v. Cooke*, 15 W. R. 576.

2. And, perhaps, the same construction would be adopted where the gift is to A. simply, and if he dies unmarried and without issue over. The argument in favour of the construction being that A.'s interest would then be indefeasable upon his marriage. See *Heywood v. Heywood*, *sup.*; see *In re Saunders' Trusts*, 3 K. & J. 152; *Radford v. Willis*, 7 Ch. 7.

The case of *Doe d. Baldwin v. Rawding*, 2 B. & Ald. 441, is not opposed to this view, since the donee there left a husband surviving her, so that upon no construction of unmarried could the gift over take effect. The point did not arise in *Bell v. Phyn*, 7 Ves. 450.

3. Of course, if the legatee were married at the date of the will this construction would be impossible.

Unmarried may refer to a second marriage.

In *Crosthwaite v. Dean*, 5 Eq. 245, a gift over of a fund in case the legatee should marry or die unmarried, where the legatee was married at the date of the will, and of the testator's death, but her husband was believed to be dead, was held to refer to a second marriage. See, too, *Lepine v. Bean*, 10 Eq. 160; *Smith v. Charles*, 13 W. R. 224.

Gift over upon death unmarried

4. If the gift is to A. for life, remainder to his children, and if A. dies unmarried and without issue over, un-

married will be read as equivalent to not having a wife at his death. To read it as never having been married would increase the chance of intestacy, since in that case, if A. married and had no children, the gift over would not take effect; and, again, the word unmarried would be mere surplusage. *Doe d. Everett v. Cooke*, 7 East, 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675.

and with-
out issue
after a
prior gift
to the
legatee for
life, and
then to his
children.

"AND" CHANGED INTO "OR" IN GIFTS OVER.

1. If there is a devise to A. in fee, and if he dies under twenty-one and without issue over, "and" will not be read "or." To do so would have the effect of divesting a prior devise in events other than those mentioned. *Malcolm v. Malcolm*, 21 B. 225; *Coates v. Hart*, 32 B. 349, 3 D. J. & S. 504.

Devise to
A. in fee,
and if he
dies under
twenty-one
and with-
out issue
over.

And, similarly, a gift to A. for life, and then to her children, and if she dies under twenty-one and without children over, will not be construed as if it were under twenty-one or without children. *Key v. Key*, 1 Jur. N. S. 372.

2. If the devise is to A. in tail, and if he dies under twenty-one and without issue over, "and" will not be read "or:" *Grey v. Pearson*, 6 H. L. 61, and *Doe d. Usher v. Jessep*, 12 East, 288; overruling *Brownsword v. Edwards*, 2 Ves. sen. 243, so far as it is an authority on this point. In this case there is reason for contending that the devise over ought to be read as equivalent to "if he dies under twenty-one or at any time without issue," since the estate would take effect as a remainder after an estate tail; but this would deprive the issue of any benefit if the devisee died under twenty-one leaving issue, unless the devise were read under twenty-one without issue, or at any time without issue, involving a very considerable alteration of the words of the will.

Devise to
A. in tail,
and if he
dies under
twenty-one
and with-
out issue
over.

This latter construction, however, would perhaps be

adopted if the original devise in tail were made contingent upon the devisee attaining twenty-one or having issue. *Brownsword v. Edwards*, 2 Ves. sen. 243.

Gift over upon two events, one of which includes the other.

3. A different question arises where the gift over is upon two events, one of which includes the other, as "if A. dies unmarried and without children."

If the gift is to A. for life, and then to his children absolutely, so that if A. has no children there would be an intestacy, there are three possible constructions :

Unmarried if possible will mean not married at the death.

a. If possible, unmarried will be held to mean unmarried at the time of death, and it is then unnecessary to change "and" into "or." *Doe v. Rawding*, 2 B. & Ald. 441; *Doe d. Everett v. Cooke*, 7 East, 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675; see *ante*, p. 376.

The same is the case if unmarried means "not married by consent." *Dillon v. Harris*, 4 Bl. N. S. 321.

If unmarried must mean never married, "and" will be changed into "or."

b. If, however, it is clear that unmarried must mean never having been married, it seems doubtful whether "and" will now be changed into "or." According to the earlier cases, there is no doubt that the change would be made. *Wilson v. Bayley*, 3 B. P. C. 195; *Hepworth v. Taylor*, 1 Cox, 112; *Maberley v. Strobe*, 3 Ves. 450; *Bell v. Phyn*, 7 Ves. 458.

These cases are, however, of doubtful authority, since the term "unmarried" would probably now in all similar cases be held equivalent to "not married at the death."

The question in *Grey v. Pearson*, 6 H. L. 61, was so different that it can hardly be said to have any bearing upon this point.

Gift over after an absolute interest, if the legatee dies before marriage and without issue.

c. But if the gift is to A. absolutely, and if he dies before marriage and without children over, "and" will not be read "or," as to do so would be to increase the defeasibility of interests already completely disposed of in all events. *Seccombe v. Edwards*, 28 B. 440.

"And" will not be changed into "or" where the gift

over is upon death in the testator's lifetime, and before receiving any benefit. *In re Kirkbride's Trusts*, L. R. 2 Eq. 400.

4. Where the two events upon which the gift over is made to depend are independent of each other, there can be no reason for changing "and" into "or." *Day v. Day*, Kay, 703; *Reed v. Braithwaite*, 11 Eq. 514; see *Barker v. Young*, 33 B. 353.

Gift over
upon two
independ-
ent
events.

CHANGE OF "OR" INTO "AND" IN GIFTS OVER.

1. If there is a devise to A. in fee if she dies leaving lawful issue, but if she dies under age or without lawful issue over, "or" will be read "and." *Johnson v. Simcock*, 6 H. & N. 6, 9 W. R. 895.

Gift over
upon death
under age
or without
lawful
issue.

2. If the devise is to A. in fee, and if he dies under twenty-one or without issue over, "or" will be read "and," to favour the issue of A. *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Denn d. Wilkins v. Kemey*s, 9 East, 366; *Eastman v. Baker*, 1 Taunt. 174; *Morris v. Morris*, 17 B. 198.

3. If the devise is to A. for life, remainder to his children in tail, and if A. dies under twenty-one or without children over, it is doubtful whether "or" would be read "and." According to the earlier authorities, the change would be made. *Hasker v. Sutton*, 1 Bing. 501, 9 J. B. Moo. 2; but see *Cooke v. Mirehouse*, 34 B. 27.

4. And where, after a prior absolute gift, the gift over is upon failure of issue or some other event, such as not making a will, "or" will be read "and," though the gift over may thereby become void. *Incorporated Society v. Richards*, 1 D. & War. 258; *Greated v. Greated*, 26 B. 621; *Green v. Harvey*, 1 Ha. 428.

Gift over
upon fail-
ure of issue
or some
other
event.

5. But if the devise is to A. in tail, and if he dies under twenty-one or without issue over, "or" will not be construed "and;" though, on the other hand, it seems

Devise to
A. in tail,
and if he
dies under

twenty-one
or without
issue over.

that if the devisee died under twenty-one, leaving issue, the gift over would not be held to have taken effect, so that the devise would, in fact, be construed as equivalent to "if A. dies under twenty-one without issue, or without issue at any time." *Mortimer v. Hartly*, 6 Ex. 47; *Soulle v. Gerard*, Cro. Eliz. 525; *Woodward v. Glasbrook*, 2 Vern. 388; and Lord St. Leonard's judgment in *Grey v. Pearson*, 6 H. L. 61. The devise over in this case takes effect as a remainder after an estate tail.

Gift over
in case of
death of
the devisee
or failure
of his
issue.

6. But if the devise over after an estate tail to A. is in case of the death of A., or want of his issue, "or" must be read "and," in order to preserve the prior estate. *Monkhouse v. Monkhouse*, 3 Sim. 119.

"Or" read
"and" in
the gift
over when
the gift is
vested in
one or
other of
the two
events.

7. "Or" will be read "and" when a gift is given upon either of two events, as upon attaining twenty-one or marriage, and there is gift over upon death under twenty-one or unmarried, the gift over being otherwise inconsistent with the prior gift. *Grant v. Dyer*, 2 Dow. 87; *Thompson v. Teulon*, 22 L. J. Ch. 243; *Thackeray v. Hampson*, 2 S. & St. 214; *Grimshawe v. Pickup*, 9 Sim. 591; *Collett v. Collett*, 35 B. 312.

Gift over
upon death
before the
tenant for
life, or
under
twenty-
one.

8. In some cases where there has been a gift contingent upon attaining twenty-one, subject to a life interest, and a gift over upon death before the tenant for life, or under twenty-one, "or" has been read "and." *Miles v. Dyer*, 5 Sim. 435, 8 Sim. 330; *Bentley v. Meech*, 25 B. 197.

And if a gift over upon death under age or without leaving a husband, is afterwards referred to as "in case of death under age as aforesaid," "or" will be read "and." *Weddell v. Mundy*, 6 Ves. 341.

GIFT OVER UPON DEATH WITHOUT CHILDREN.

In many cases where an estate in fee is given, followed by a gift over in the event of the devisee dying without children, the word children has been construed as synonymous with issue. *Doe v. Webber*, 1 B. & Ald. 713; *Doe d. Simpson v. Simpson*, 5 Sc. 770, 4 Bing. N. C. 333; *Doe d. Blesard v. Simpson*, 3 M. & Gr. 929; *Bacon v. Cosby*, 4 De G. & S. 261; *Parker v. Birks*, 1 K. & J. 156; *Richards v. Davies*, 13 C. B. N. S. 69, 861; see *Mathews v. Gardiner*, 17 B. 254.

“Children” read
“issue”
in a gift
over upon
death
without
children.

And the same construction would perhaps be put upon a similar gift over after an absolute bequest of personalty. *Synge's Trust*, 3 Ir. Ch. 379; see *Stone v. Maule*, 2 Sim. 490.

GIFTS OVER UPON DEATH WITHOUT LEAVING OR
HAVING ISSUE.

The word leaving in a gift over upon death without leaving issue will, if possible, be so construed as not to destroy prior vested interests, it will in fact be taken as equivalent to “without having had children who take vested interests.”

Leaving
construed
as equi-
valent to
having.

1. Thus, when there is a bequest or devise to A. for life, and after his death to his children, whether a particular time is fixed at which their shares are to vest or not, followed by a gift over upon the death of A. without leaving children, the children of A., either at their birth or at the particular time appointed, as the case may be, take indefeasible interests not liable to be defeated by death during the life of A. *Maitland v. Chalie*, 6 Mad. 243; *Marshall v. Hill*, 2 Mau. & S. 608; *Ex parte Hooper*, 1 Dr. 264; *Kennedy v. Sidgwick*, 3 K. & J. 540; *Re Thompson's Trusts*, 5 De G. & S. 667; *White v. Hill*, 4 Eq. 265;

Casamayor v. Strode, 8 Jur. 14; *In re Brown's Trust*, 16 Eq. 239; *Treharne v. Layton*, L. R. 10 Q. B. 459.

2. The Court, however, will not depart from the ordinary meaning of the word leaving, in order to vest interests which were not vested before.

When the gift is, for instance, if the tenant for life leaves children, to all such children, with a gift over in the event of his death without leaving children, the word leaving must have its ordinary meaning. In these cases the condition of surviving the tenant for life is part of the original gift, and there is no question of divesting a prior gift: *Sheffield v. Kennett*, 27 B. 207, 4 De G. & J. 593; *Bythesea v. Bythesea*, 17 Jur. 645, 23 L. J. Ch. 1004; *Young v. Turner*, 1 B. & S. 550; see *In re Watson's Trust*, 10 Eq. 36, and the comments therein upon *Bryden v. Willett*, 7 Eq. 472; *Jeyes v. Savage*, 10 Ch. 555; and see *Hedges v. Harper*, 3 De G. & J. 129.

Without
having any
child.

3. It seems the words "without having any child" may be construed as equivalent to "without having had" any child. *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Wall v. Tomlinson*, 16 Ves. 413; *Jeffreys v. Conner*, 28 B. 328.

Without
any chil-
dren.

4. But the words "without any children" mean without children at the death. *Thicknesse v. Liege*, 3 B. P. C. 365; *Jeffreys v. Conner*, *supra*.

CHAPTER XXX.

GIFTS OVER UPON DEATH WITHOUT ISSUE.

WHEN there is a gift over upon the death of A. without issue before a given period, the gift over takes effect upon the failure of issue of A., not necessarily at his death, but at any time before the given period, whether the will is before or since the Wills Act. *Jarman v. Vye*, L. R. 2 Eq. 784.

Gift over upon death of the devisee without issue before a given period.

It is not quite clear whether a devise upon failure of issue to such of certain named legatees as should be "then living," which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death. See *Murray v. Addenbrook*, 4 Russ. 407; *Greenwood v. Verdon*, 1 K. & J. 74.

Gift over upon death without issue to persons then living.

By the 29th section of the Wills Act, 1 Vict. 26, words "which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of

Effect of the 29th sec. of the Wills Act upon gifts in default of issue.

an estate tail to such person or issue, or otherwise : provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Death
without
issue male.

The words dying without male issue will, under this section, be restricted to male issue living at the death of the ancestor. *Upton v. Hardman*, I. R. 9 Eq. 157.

This section does not apply :—

In what
cases the
section
does not
apply.

1. Where the words used are heirs of the body and not issue. *Harris v. Davis*, 1 Coll. 416; *Re Sallery*, 11 Ir. Ch. 236; *Dawson v. Small*, 9 Ch. 651.

2. Where the failure of issue would not before the Act have been construed to import an indefinite failure of issue. *Morris v. Morris*, 17 B. 198.

3. Apparently it would not apply where there is a gift of personalty to A. and the heirs of his body, followed by a gift over in default of his issue. At any rate, it does not where realty and personalty are given together in tail. *Green v. Green*, 3 De G. & Sm. 480; see *Greenway v. Greenway*, 2 D. F. & J. 137.

REFERENTIAL CONSTRUCTION OF GIFTS OVER UPON DEATH WITHOUT ISSUE.

The construction of gifts over in default of issue is not affected by the Wills Act where those words are construed to mean default of issue to take under the preceding limitations. It becomes necessary, therefore, to consider in what cases the referential construction has been adopted.

A. Where the words are for default of *such* issue, they naturally refer to the issue before mentioned.

1. This is clearly the case where the prior limitations are in tail. *Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320.

2. So where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. *Doe d. Comberbach v. Perryn*, 3 T. R. 484; *Rex v. Marquess of Stafford*, 7 East, 521.

Gift over
in default
of such
issue, after
limitations
in tail.
After limi-
tations in
fee.

But if there is anything to show that the children were intended to take estates tail, the words in default of such issue may be referred to the word heirs so as to cut down the estates to estates tail. Thus, where the limitation was to the first and other sons and their heirs, a gift over in default of such issue was referred to the word heirs, the intention being that the sons were to take in succession. *Lewis d. Ormond v. Waters*, 6 East, 336.

In *Biddulph v. Lees*, 8 E. & B. 289, the intention to give estates tail was apparent from the shifting clause.

3. And even though the limitation be to children simply, so that they would only take for life, a gift over in default of such issue will be construed referentially. *Hay v. Earl of Coventry*, 3 T. R. 83; *Denn d. Breddon v. Page*, 3 T. R. 87 n., 11 East, 603 n.; *Ashley v. Ashley*, 6 Sim. 358; *Bridger v. Ramsay*, 10 Ha. 320; *Re Arnold's Estate*, 33 B. 163.

After limi-
tations for
life.

4. On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the Court will lay hold of small circumstances to give the first son also an estate tail.

After limi-
tations
giving a
first son a
life interest
only, and
the other
sons estates
tail.

Thus, in *Evans d. Brooke v. Astley*, 3 Burr. 1569, there was the circumstance that the testator referred to the earlier limitations as including the "parent and his descendants."

In *Clements v. Paske*, 3 Doug. 384, the limitation to the first son was referred by the word "likewise" to other limitations in fee.

And see *Doe d. Harris v. Taylor*, 10 Q. B. 718, which may perhaps be supported on the ground that the words "the elder of such sons and the heirs of his body to take before the younger," applied to the first son as well as to the others. See, however, *Barnacle v. Nightingale*, 14 Sim. 456; and see *Galley v. Barrington*, 2 Bing. 387; *In re Denny's Estate*, I. R. 8 Eq. 427.

Inaccurate
use of the
word
"such."

5. The *prima facie* meaning of the word "such" is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations; it may, however, have the converse effect, if there is anything upon the will to show, that the testator used the earlier word in the sense of the later; and the word "such" may be rejected, if the term with which it is coupled and that to which it refers are so inconsistent with each other, that the testator cannot have meant the one as a mere compendious reference to the other.

Thus, a devise to A. and his heirs, and in default of such issue over would, perhaps, in a will cut down A.'s estate to an estate tail. See *Idle v. Cook*, 1 P. Wms. 70.

And in *Parker v. Tootal*, 11 H. L. 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of Thomas or of James, over, the word such was practically rejected, and Thomas took an estate tail.

Gift over
in default
of issue
simply.

B. When there is a devise to A. for life, followed by particular limitations in favour of some of his issue, with an ultimate limitation on failure of the issue of A., the question arises whether the intention was to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, in which case, in wills before the Wills Act, the gift over in default of issue will give A. an estate tail, or whether the issue

intended to be benefited are sufficiently indicated by the special limitations, in which case the failure of issue will be construed to mean such issue as before mentioned.

1. If the devise is to A. for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A. over, issue means the issue before mentioned, and A.'s estate will not be enlarged. *Foster v. Hayes*, 2 E. & B. 27, 4 E. & B. 717; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Smyth v. Power*, I. R. 10 Eq. 192.

When the prior limitations are to the ancestor for life with remainder to his children in fee or in tail.

And this is the case, though the children included under the prior limitations may be sons only and not daughters, and though the prior estates may be in tail male. *Turke v. Frenchman*, 2 Dyer, 171, 1 And. 8; *Baker v. Tucker*, 11 Ir. Eq. 104, 3 H. L. 106.

When the prior limitations include sons only.

Quære, whether it makes any difference in the construction of the gift over in default of issue that the ancestor has children living at the date of the devise. See *Doe d. Todd v. Tuesbury*, 8 M. & W. 514, commented on in 4 E. & B. 730.

2. If, however, the prior limitations include less than the whole number of sons the referential construction will not be adopted. *Langley v. Baldwin*, 1 Eq. Ab. 185, pl. 29, cit. 1 P. W. 759; *A.-G. v. Sutton*, 1 P. W. 758, 3 B. P. C. 75; *Stanley v. Lennard*, Amb. 355, 1 Ed. 87; *Key v. Key*, 4 D. M. & G. 73.

Where the prior limitations include less than the whole number of sons.

The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders v. Ashford*, 28 B. 609.

3. If the failure of issue is restricted to failure at the death of the parent the referential construction will not be adopted, as it might have the effect of divesting the interests of children who had died before the tenant for life, leaving children. *Westwood v. Southey*, 2 Sim. N. S.

When the failure of issue is restricted to such failure at the ancestor's death.

192; *Ex parte Hooper*, 1 Dr. 264; *Re Tookey's Trust*, 21 L. J. Ch. 402.

Gift over
in default
of issue
after a
power to
appoint to
issue by
will.

4. If the gift is to A. for life, then to such issue as he should appoint by will, and if A. dies without issue over, issue in the gift over is held to refer to the issue before-mentioned, that is to say, issue living at the death of A. *Target v. Gaunt*, 1 P. W. 432; *Hockley v. Mawbey*, 1 Ves. jun. 143, 3 B. C. C. 82; *Leeming v. Sherratt*, 2 Ha. 14; *Hanan v. Drew*, 10 Ir. Eq. 333; *Eastwood v. Avison*, L. R. 4 Ex. 141.

Where the
limitations
to issue are
contingent.

5. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe d. Rew v. Lucraft*, 1 M. & Sc. 573, 8 Bing. 386; *Franks v. Price*, 6 Sc. 710, 5 Bing. N. C. 37, 3 B. 182.

Where the
children
take for
life only in
wills before
the Wills
Act.

6. In wills, before the Wills Act, where the devise to children is without words of limitation so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr v. Swindells*, 4 Russ. 283. *Bennett v. Lowe*, 5 M. & Pay. 485, 7 Bing. 535, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue; and *Wight v. Leigh*, 15 Ves. 564, which conflicts with the latter branch of this rule, would probably not now be followed.

Referential
construc-
tion of
gifts over
upon death
without
issue in the
case of per-
sonalty.

C. Similar rules apply to personalty.

1. Thus, in a bequest to A. for life, and then to his children, and if A. dies without issue over, the gift over refers to the failure of the objects of the prior gift. *Doe d. Lyde v. Lyde*, 1 T. R. 593; *Salkeld v. Vernon*, 1 Ed. 64; *Robinson v. Hunt*, 4 B. 450; *In re Wyndham's Trusts*, L. R. 1 Eq. 290; *In re Sanders' Trusts*, Ib. 675.

“If there be no child there can be no other issue, and if there be a child, the child will take the whole, and

there will be nothing to limit over." *Per* Turner, L. J., *Pride v. Fooks*, 3 De G. & J. 252.

2. But where the prior gifts to the children are not vested so that there may be issue who may not take under them, for instance, children of children who die before the time of vesting, it is less easy to admit the referential construction, and it seems that without some further indications to be collected from the will it will not be adopted. *Pride v. Fooks*, 3 De G. & J. 252; *Walker v. Mower*, 16 B. 365.

Where the prior gifts to issue are contingent.

And the same is the case where the gifts to the children are only to arise upon a contingency, as for instance, if the legatee marries. *Andree v. Ward*, 1 Russ. 260; *Campbell v. Harding*, 2 R. & M. 390, 2 Cl. & Fin. 481, 8 Bl. N. S. 469.

3. But if there is anything to assist the referential construction it will be adopted. See *Malcolm v. Taylor*, 2 R. & M. 416, where this construction was assisted by the devise of the realty.

Referential construction assisted by other limitations.

4. And when there is elaborate provision made for the issue of children dying before the time of vesting, and born within the limits of perpetuity, a gift over in default of issue may very well be referred to the prior limitations. *Ellicombe v. Gompertz*, 3 M. & Cr. 127; *Trickey v. Trickey*, 3 M. & K. 560.

When the issue of parents dying before the time of vesting are provided for.

5. The referential construction will not be adopted where the bequest is in joint tenancy to A. and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention there can be no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher v. Webster*, 14 Eq. 283.

Bequest in joint tenancy to a parent and children, followed by a gift over on death without issue.

GIFTS OVER UPON DEATH WITHOUT ISSUE BEFORE THE WILLS ACT.

Such words as "dying without issue," or "without leaving," or "having issue" in devises before the Wills Act are construed to mean an indefinite failure of issue. *Lee's Case*, 1 Leon. 285, pl. 387; *Cole v. Goble*, 13 C. B. 445.

Cases before the Wills Act, in which gifts over on failure of issue will not import an indefinite failure.

But with regard to personalty, death without *leaving* issue is held to mean leaving issue at the death. And where real and personal estate is devised by the same words, death without leaving issue will import an indefinite failure of issue as regards the realty, but a failure of issue at the death as regards the personalty. *Forth v. Chapman*, 1 P. W. 663; *Bamford v. Chadwick*, 2 W. R. 530.

The failure of issue will, however, be restricted in devises of realty.

Gift over upon failure of the testator's own issue.

1. If the ulterior limitations are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, such as directions for payment of debts. *Rye's Settlement*, 10 Ha. 106.

It has been said that a devise on failure of the testator's *own* issue, he having none at the time, will in itself be sufficient to show that the testator does not refer to an extinction of issue at any time. The cases, however, quoted in support of the proposition, cannot be said to establish the exact point, since in all of them the devise over was for payment of debts or legacies. *French v. Caddell*, 3 B. P. C. 257; *Wellington v. Wellington*, 4 Burr. 2165, 1 W. Bl. 645; *Lytton v. Lytton*, 4 B. C. C. 441; *Sanford v. Irby*, 3 B. & Ald. 654.

In *Bagot v. Legge*, 12 W. R. 1097, 4 N. R. 492, it was

assumed that a devise upon failure of the testator's issue, though he had none at the time, would have been void for remoteness.

2. If the devise is upon death without issue under twenty-one or over twenty-one, or upon some other event personal to the devisee. *Toovey v. Bassett*, 10 East, 460; *Right v. Day*, 16 East, 67; *Gwyne v. Berry*, 1. R. 9 C. L. 494. Death without issue under twenty-one.

The same rule has been applied where the limitations were upon death under twenty-one and without issue. *Glover v. Monckton*, 3 Bing. 13; *Doe d. Johnson v. Johnson*, 8 Ex. 81.

But the rule does not apply where the event is not purely personal to the devisee; for instance, if the gift over is if A. survives B. and dies without issue. *Feakes v. Standley*, 24 B. 485.

3. So, too, with regard to personalty, a gift over if A. dies under twenty-one without issue means issue living at his death. *Pawlet v. Dogget*, 2 Vern. 85; *Martin v. Long*, Ib. 151; *Morris v. Morris*, 17 B. 198. As regards personalty.

4. Failure of issue is restricted to failure at the death of the parent if the devise is on failure of the issue of A., then "at" or "on" the death of A. over. *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Doe d. King v. Frost*, 3 B. & Ald. 546; *Ex parte Davies*, 2 Sim. N. S. 114; *Parker v. Birks*, 1 K. & J. 156. Gift over at or on the death of the ancestor.

It makes no difference whether A. takes the fee or only a life estate owing to the absence of words of limitation. *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

There seems no reason to doubt that in the case of realty the words "after the death of A." would *prima facie* mean immediately after, and have the same restrictive force as they have in the case of personalty. See *Trotter v. Oswald*, 1 Cox, 317. Effect of the word after.

But it may appear from the context that those words

were not to have a restrictive force. *Walter v. Drew*, Com. 373.

Rule in the
case of
personalty.

In the same way with regard to personalty, if the gift is if A. die without issue at, on, or after his decease over, the failure of issue means failure at A.'s death. *Dunk v. Fenner*, 2 R. & M. 557; *Pinbury v. Elkin*, 1 P. Wms. 568; *Trotter v. Oswald*, 1 Cox, 317; *Rackstraw v. Vile*, 1 S. & St. 604; *Hedges v. Harper*, 3 De G. & F. 129.

Effect of a
direction
to pay a
sum of
money
upon the
decease of
the ances-
tor.

5. So, too, if a sum of money is to be paid upon the decease of the devisee, upon failure of whose issue the estate is given over, or within a short time afterwards, the failure of issue will not import an indefinite failure. *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Doe d. King v. Frost*, 3 B. & Ald. 546; *Nichols v. Hooper*, 1 P. W. 198, 2 Vern. 686; *Blinston v. Warburton*, 2 K. & J. 400; *Rye's Settlement*, 10 Ha. 106. Perhaps *Keily v. Fowler*, 6 B. P. C. 309, Wilm. 298, comes under this head.

Gift over
in default
of issue to
persons
"then
living."

6. A gift over upon failure of issue to persons "then living," the persons being such as must be ascertained within the limits of perpetuity, will not be construed to mean an indefinite failure of issue. *Murray v. Addenbrook*, 4 Russ. 407; *Greenwood v. Verdon*, 1 K. & J. 74.

In such cases the failure of issue contemplated is not a failure at the death of the ancestor, but at any time during the lives of the legatees, to take under the gift over. Cases *supra* cit., and *Crowder v. Stone*, 3 Russ. 217; and see *Jarman v. Vye*, L. R. 2 Eq. 784.

Candy v.
Campbell.

In *Candy v. Campbell*, 8 Bl. N. S. 469, 2 Cl. & F. 421, a gift in default of issue to the testator's nephews and nieces who might be living at the time, was held void for remoteness. It does not appear whether the testator's parents were alive; if they were not, the gift must have vested in persons born during the lives of his brothers and sisters living at his death, and, upon the

principle above stated, the failure of issue might have been restricted to the lives of those persons.

In *Gee v. Audley*, 1 Cox, 324, the point does not appear to have been raised whether the failure of issue could be restricted to the lives of the persons to take under the gift over.

Of course, where the class to whom the property is given on failure of issue would include persons coming into being at any time before the failure of issue takes place, there is no reason for restricting the failure of issue. *Webster v. Parr*, 26 B. 236.

In the same way, where the class, to whom the gift is made upon failure of issue, is not to be ascertained at the time when the failure happens, but upon some collateral event; if, for instance, the gift is upon failure of issue to the children of my brothers living at the death of my last child, so that the class to take is ascertained at a different time from the period of possession, there is no reason for restraining the failure of issue, since children may take transmissible interests without surviving the failure of issue. *Garrett v. Cockerell*, 1 Y. & C. C. 494.

Gift in default of issue to a class ascertainable upon some collateral event.

7. It would seem that the same principle ought to apply where the gift is to several, and if any die without issue to the survivors.

Gift in default of issue to survivors.

Therefore, in such a case, if survivors means those who survive the failure of issue, the failure of issue can only import a restricted failure. The cases, however, seem to show that a mere gift if any die without issue to the survivors without more would be sufficient to restrict the failure of issue to the death of the parent. *Hughes v. Sayer*, 1 P. Wms. 534; *Ranelagh v. Ranelagh*, 2 M. & K. 441; *Westwood v. Southey*, 2 Sim. N. S. 192; *Turner v. Frampton*, 2 Coll. 331.

When survivorship refers to the failure of issue.

But if survivor means not the person surviving the failure of issue but the longest liver of the legatees, so

When survivorship is merely

among the legatees.

that one legatee surviving another would take a transmissible interest before the failure of issue, the failure of issue will not be restricted. *Chadock v. Cowley*, Cro. Jac. 695.

Effect of words of limitation.

It is submitted that, where the meaning of survivors is clear, words of limitation superadded are immaterial; but where it is doubtful whether the survivorship contemplated is between the legatees, or is to be referred to the period of failure of issue, words of limitation superadded afford a strong argument that the former was intended. *Massey v. Hudson*, 2 Mer. 130; *O'Donohoe v. King*, 8 Ir. Eq. 185.

When survivorship is referrible to the stirpes.

Upon the same principle, in all those cases where survivors would be read others, or there is an intention to benefit not merely the persons who survive the failure of issue, but their stirpes, the failure of issue will not be restricted. *Roe v. Scott*, Fearne, C. R. 473 n.; *Taylor v. Walker*, 13 W. R. 986; *Assignees of Leadbeater*, I. R. 8 Eq. 422; see, too, *M'Clenaghan v. Bankhead*, I. R. 8 C. L. 195.

Gift over in default of issue to a named person.

8. There is no authority for saying that a gift on failure of issue to A., a definite named person without more, would have the effect of restricting the failure of issue. *Lord Beauclerk v. Dormer*, 2 Atk. 307; *Barlow v. Salter*, 17 Ves. 479; see Fearne, C. R. 481.

Intention to confer personal enjoyment.

On the other hand, a gift in default of issue of A. to two persons, or such of them as should be then living, has been held sufficient to show that the testator meant a personal enjoyment by the legatees, and could not therefore have intended a general failure of issue: *Wilson v. Chesnut*, I. R. 1 Eq. 559. Perhaps *Roe d. Sheers v. Jeffery*, 7 T. R. 589, may stand on this ground.

Jones v. Cullimore, 3 Jur. N. S. 404, where the gift was on failure of issue to such of my children as may be then living, and if none should be then alive to a person named,

and a class must probably be supported on the ground that the testator showed by the gift to children then living that he did not intend an indefinite failure of issue, and not on the ground that the ultimate gift was to a definite person.

9. Perhaps failure of issue would be restricted if the subsequent estates are all given to living persons for life only. *Roe d. Sheers v. Jeffery*, 7 T. R. 589; see *Trafford v. Boehm*, 3 Atk. 440.

Where the subsequent estates are all for life.

10. If the estate devised is *pur autre vie* a limitation over in default of issue is good, since it cannot be held to mean a failure, which might take place after the determination of the estate. *Croly v. Croly*, Batty, 1; *Manning v. Moore*, Alc. & Nap. 96; *Lee v. Flinn*, Ib. 418.

Where the estate is *pur autre vie*.

11. If the property devised is a reversion which comes into possession only after the failure of issue of some person, a devise of such reversion after failure of the issue in question is in effect an immediate devise of the reversion and therefore valid. And even if the event upon which the reversion is expressed to be devised is larger than and includes the event upon which it comes into possession, the devise will be good if in effect the two events are the same, and the intention is merely to devise the reversion. If, for instance, the reversion falls into possession on failure of issue by a particular wife of the testator, and the testator devises it upon a general failure of issue, the devise is good, as the birth of issue by a second marriage would revoke the will. *Jones v. Morgan*, Fearne, C. R. App. 577, 3 B. P. C. 322; *Lytton v. Lytton*, 4 Bro. C. C. 441.

Devise on a general failure of issue of a reversion dependent on failure of certain lines of issue.

In the same way, if the testator erroneously recites that he is entitled to the reversion of certain estates on the death of a son without issue generally, and then devises the reversion on failure of such issue, the devise is good, the intention being clear to devise the reversion.

Lewis v. Templer, 33 B. 625; see *Bankes v. Holme*, 1 Russ. 394 n.

But a mere devise of a reversion upon a failure of a larger class of issue than that upon which it is limited, will not operate as an immediate devise of the reversion. *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262.

CHAPTER XXXI.

SHIFTING CLAUSES.

WHERE estates are given by will, and there is a clause shifting the lands if the devisee comes into possession of estates previously settled, the estates go over if the event happens. *Cope v. Earl de la Warr*, 8 Ch. 982.

And the shifting clause will operate upon the life interest of a tenant for life, though his interest is such, that if he comes into possession of the settled estates, his life interest under the will must at the same time come into possession; so that, in effect, the gift of the life interest is nugatory. *Lambarde v. Peach*, 4 Dr. 553, 1 D. F. & J. 495.

When estates devised by will are directed to shift on the devisee coming into possession of settled estates, the presumption is that the testator means a possession under the settlement; and, therefore, if the devisee comes into possession of the settled estates not under the settlement, but under an entirely new title, for instance, under the will of a tenant in tail, who had barred the entail, the shifting clause will not take effect. *Taylor v. Earl of Harewood*, 3 Ha. 372; *Wandesforde v. Carrick*, 1. R. 5 Eq. 486.

À fortiori, where the shifting clause is to take effect on the devisee becoming entitled to other estates under any existing or future will or settlement, and he becomes entitled by descent from his father, though the latter

A shifting clause operates upon a life estate, though the life estate comes into possession in the same event as that upon which the shifting clause is to take effect. Possession of settled estates *prima facie* refers to possession under the settlement.

took under a will, the devised estates will not shift. *Walmesley v. Gerard*, 29 B. 321.

Meaning of
"entitled."

The term entitled would in such a clause mean entitled in possession. *Umbers v. Jaggard*, 9 Eq. 200; see *Gryll's Trusts*, 6 Eq. 589.

Whether a
devisee
taking
settled
estates
under a re-
settlement
is within a
shifting
clause.

But if the devisee takes the settled estates not under the settlement existing at the date of the will, but under a resettlement, which can be looked upon as a continuation of the old title, the devisee taking the same interest under the resettlement as he would have taken under the old settlement, except so far as his interest has been diminished for his own benefit, the shifting clause takes effect. *Harrison v. Round*, 2 D. M. & G. 190.

But if the devisee takes under the resettlement a diminished interest in the settled estates, or the estates themselves are diminished in quantity, the shifting clause has no effect. *Fazakerley v. Ford*, 4 Sim. 390; see 3 A. & E. 897; *Gardiner v. Jellicoe*, 12 C. B. N. S. 568; *Meyrick v. Laws*, 9 Ch. 237.

On the other hand, if the testator expressly gives directions to have a portion of the settled estates settled to other uses, the devolution of the settled estates to the devisee diminished by that portion will not prevent the operation of the shifting clause. *Micklethwait v. Micklethwait*, 4 C. B. N. S. 790; and see *Stacpoole v. Stacpoole*, 2 Con. & Law. 489, 501.

The shifting clause will not, in the absence of a clear intention, take effect where the devisee has only an interest in remainder in the settled estates. *Monypenny v. Dering*, 2 D. M. & G. 145; *Curzon v. Curzon*, 1 Giff. 248; *Bagott v. Legge*, 34 L. J. Ch. 156, 12 W. R. 1097.

As to the repeated operation of a shifting clause, see *Doe d. Lumley v. Earl of Scarborough*, 3 A. & E. 2, 897; *Monypenny v. Dering*, 2 D. M. & G. 145.

It seems a shifting clause would not avoid jointures

and portions properly charged upon the estates previous to their shifting. *Holmesdale v. West*, 12 Eq. 280.

Where an estate devised by will is directed upon the devolution of settled estates to the devisee to go over to the next remainder-man, as if the tenant for life were dead, the estate will shift to trustees, to preserve contingent remainders where there are contingent remainders to unborn sons of the tenant for life whose life estate has ceased; though, strictly speaking, if the tenant for life were dead, the estate of the trustees to preserve would also be at an end. *Doe v. Heneage*, 4 T. R. 13; see the opinion of Fearne, C. R. App. No. 6; *Stanley v. Stanley*, 16 Ves. 491; *Morrice v. Langham*, 11 Sim. 260, 12 Sim. 615; and see 11 Cl. & F. 667; *Lambarde v. Turton*, 4 Dr. 553, 1 D. F. & J. 495; see *Lord Kenlis v. Earl of Bective*, 34 B. 587.

In what cases estates directed to shift to the next remainder-man will go to the trustees to preserve.

As to whether the heir or remainder-man is entitled to the rents during the period between the shifting of the estate to the trustees and the birth of issue to take, it seems that a direction that the rents may be applied for the maintenance of a remainder-man even during the lifetime of a tenant for life, would be sufficient to show that the rents were not to go to the heir. *Turton v. Lambarde*, 1 D. F. & J. 495, judgment of the L. J. Turner. *D'Eyncourt v. Gregory*, 34 B. 36.

Who is entitled to the intermediate rents.

On the other hand, in the absence of some such intention, they would go to the heir. *Stanley v. Stanley*, 16 Ves. 491; and see per Kindersley, V. C., *Lambarde v. Peach*, 4 Dr. 553.

When the devised estate is directed to go over, as if the person becoming entitled to the settled estates were dead without issue, the next remainder-man takes on the event happening. *Morrice v. Langham*, 8 M. & W. 194.

Estate directed to shift as if the devisee were dead without issue.

And in such a case, if the next limitations in remainder are contingent, the estates will not go to trustees to pre-

In such case trustees to

preserve
will not
take.

serve contingent remainders during the life of the person from whom the estate is shifted, since their estate would in any event be inadequate to support contingent remainders limited upon a failure of issue of such person after his death. *Carr v. Earl of Errol*, 6 East, 58.

When the devised estates are directed to go to the next remainder-man, as if the person taking the benefit upon the accruer of which the estate is to shift were dead without issue, the construction will not be influenced by the fact that the younger children of the person from whom the estates shift may happen to take no benefit under the settlement. *Doe v. Earl of Scarborough*, 3 Ad. & E. 1.

Issue
limited to
issue capa-
ble of
taking
under the
limitation
of the de-
vised es-
tate pre-
ceding the
next re-
mainder.

But where estates were devised to several sons successively in tail male, with remainder to the children of the sons in tail general, with remainder over, and the estates were directed to go over upon the acquisition of settled estates (which could not go to any female issue of the testator's sons), as if the person taking the settled estates were dead without issue, the words "without issue" were confined to issue capable of taking under the limitations of the devised estate preceding the next remainder. *Gardiner v. Jellicoe*, 12 C. B. N. S. 568, 11 H. L. 323.

CHAPTER XXXII.

GIFTS BY REFERENCE.

A BEQUEST of chattels to go according to the same limitations as real estate, or as heirlooms, vests absolutely in the first tenant in tail on birth, whether the words "so far as the rules of law and equity permit" are inserted or not. *Vaughan v. Burslem*, 3 B. C. C. 101; *Rowland v. Morgan*, 6 Ha. 463, 2 Ph. 764; *Carr v. Lord Erroll*, 14 Ves. 478; *Burrell v. Crutchley*, 15 Ves. 544; *Lord Scarsdale v. Curzon*, 1 J. & H. 40; *In re Johnson's Trusts*, L. R. 2 Eq. 716. The Court, in fact, refuses to treat such a bequest as executory.

Bequest of chattels to go according to the limitations of real estate, vests in the first tenant in tail on birth.

The right to the chattels is not destroyed by a disentailing deed. *Hogg v. Jones*, 32 B. 45.

But the chattels will not vest in a tenant in tail whose estate is liable to be divested by the birth of issue to take under prior limitations, and who dies before his estate becomes indefeasibly vested. *Hogg v. Jones*, 32 B. 45.

Similarly, chattels directed to go to the persons entitled in possession to estates will go to a tenant for life, unless they are directed to go as heirlooms, or there is an intention expressed that the personalty is to go along with the realty. *Trafford v. Trafford*, 3 Atk. 347; *In re Johnson's Trusts*, L. R. 2 Eq. 716.

Bequest of chattels to the person entitled in possession to real estate.

If there is such an intention, a tenant for life of the realty, or, where the personalty is to go with a title, the

first possessor of the title, will take only an estate for life in the personalty. *Trafford v. Trafford*, 3 Atk. 347 ; *Shelley v. Shelley*, 6 Eq. 540 ; *Montagu v. Lord Inchiquin*, 23 W. R. 592 ; see *Mackworth v. Hinxman*, 2 Kee. 658.

But chattels given as heirlooms, and directed to go to such person as shall first attain twenty-one and be entitled to an estate tail in possession in the settled estate, will nevertheless vest absolutely in a tenant in tail in remainder who attains twenty-one. *Foley v. Burnell*, 1 B. C. C. 274, 4 B. P. C. 319 ; *In re Johnson's Trusts*, L. R. 2 Eq. 716 ; *Martelli v. Holloway*, L. R. 5 H. L. 532.

Intention
that no
person not
in actual
possession
is to take.

But a plain intention that no person shall take the chattels who does not live to become entitled to the possession of the realty, will have effect. *Trafford v. Trafford*, 3 Atk. 347 ; see *per* Lord Eldon in *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 231 ; *Potts v. Potts*, 9 I. E. 577, 1 H. L. 671 ; *Cox v. Sutton*, 25 L. J. Ch. 845, 2 Jur. N. S. 733 ; *Lord Scarsdale v. Curzon*, 1 J. & H. 52.

Whether
the words
"as far as
the rules of
law admit"
will carry
on chattels
directed
not to vest
in a tenant
in tail
dying
under
twenty-one
to the next
tenant in
tail.

When heirlooms are directed to go with real estates as far as the rules of law and equity permit, with a proviso that they are not to vest absolutely in any tenant in tail dying under twenty-one, it seems doubtful whether, in the event of a tenant in tail dying under twenty-one, the effect of the words "as far as the rules of law and equity permit" will be to carry on the property to the next succeeding tenant in tail, or whether the result would be an intestacy. The question arose in *Harrington v. Harrington*, but was not there decided, the opinion of Lord Cairns being in favour of an intestacy, and of Lord Westbury in favour of the transmission of the property within the limits of perpetuity. See L. R. 3 Ch. 564, *ib.*, 5 H. L. 87.

When a bequest has been made to several persons as tenants in common for life, with remainder to their children, and there is a subsequent gift to the same persons *in the same manner* as the prior bequest, the second bequest will be subject to the same limitations for life and remainders over. *Milsom v. Awdrey*, 5 Ves. 465; *Eames v. Anstee*, 33 B. 264; *Smith v. Greenhill*, 14 W. R. 912; *Giles v. Milsom*, L. R. 6 H. L. 24.

Bequests
"in the
same man-
ner" as
prior be-
quests.

In *Sweeting v. Prideaux*, 2 Ch. D. 413, a subsequent gift for the life of the legatee only "in the same manner in every respect and subject to the same control" as the prior gift, was held on the language of the will to import the limitation in remainder of the prior gift to the children of the legatee.

If, however, the original gift is directed to fall into the residue in default of children, and the residue is then given to the same persons "in the same manner," these words will be referred, if possible, to a tenancy in common or separate use. *Shanley v. Baker*, 4 Ves. 731.

And where the original gifts are absolute, subject to executory gifts over, a subsequent gift to be held "in the same manner" as the prior gift will not import the executory gifts over if the words can be referred to a tenancy in common. *Lumley v. Robbins*, 10 Ha. 621; and see *Hare v. Hare*, 24 W. R. 575.

The referential words may, however, be strong enough to import all the limitations and restrictions of the preceding gift. *Ross v. Ross*, 2 Coll. 269; *Re Colshead*, 2 De G. & J. 690; *Re Shirley's Trusts*, 32 B. 394; *Ord v. Ord*, L. R. 2 Eq. 393.

Gift by
reference
may import
all the
limitations
of a prior
gift.

When there is a gift to a class of persons living at a particular time, and a subsequent gift to the same class, without the restriction of being alive at the particular time, "in the same manner" as the prior gift, this will not cut down the class to take the second gift: *Yardley*

v. Yardley, 26 B. 38 ; *Piggott v. Wildes*, 26 B. 90 ; *Re Wilder's Trusts*, 27 B. 418.

But there may be words which will have this effect. *Swift v. Swift*, 11 W. R. 334, 32 L. J. Ch. 479.

Redupli-
cation of
charges.

When property is given upon the same trusts as other property which is subject to a power to raise a definite sum, the property so given by reference is not subject to an additional charge of the same amount. *Hindle v. Taylor*, 5 D. M. & G. 577, 599 ; *Boyd v. Boyd*, 9 L. T. N. S. 166, 2 N. R. 486.

But if the power is to raise a charge not exceeding a certain proportion of the value of the property, the power to charge is increased in proportion by the value of the added property. *Cooper v. Macdonald*, 16 Eq. 258.

Gift to per-
sons "be-
fore
named."

It may be noticed that a bequest to persons "before named" may refer to persons before mentioned, and will not without more be confined to persons expressly mentioned by name. *In re Holmes*, 1 Dr. 321 ; *Bromley v. Wright*, 7 Ha. 334.

CHAPTER XXXIII.

EXECUTORY TRUSTS.

EVERY trust which requires a future conveyance or settlement is so far executory ; but the mere fact that the testator contemplates a future settlement, will not justify the Court in putting upon the words of a testator any other than their legal meaning. Executory trusts defined.

When the testator, though contemplating the execution of a future instrument, declares the trusts upon which the property is to be held by reference to another instrument, those trusts are looked upon as incorporated into the will, and must have their ordinary legal meaning. *Christie v. Gosling*, L. R. 1 H. L. 279 ; see *Viscount Holmesdale v. West*, L. R. 3 Eq. 474.

If the testator himself declares the trusts to be inserted in the contemplated settlement, the question then is “whether he has been his own conveyancer,” in which case the trusts declared by him must be literally followed, or whether the trusts declared by him are merely the headings of a future settlement, in which case they will be so carried out as to effectuate his intention. See *Egerton v. Earl of Brownlow*, 4 H. L. 1, 210 ; *Austen v. Taylor*, 1 Ed. 361, Amb. 376 ; *Boswell v. Dillon*, Dru. temp. Sug. 291.

Thus a direction to purchase lands to be held on the trusts declared with respect to other lands, must be obeyed by literally adopting those trusts. *Austen v. Taylor*, 1 Ed. 361, Amb. 376.

Distinction
between
marriage
articles
and wills.

In marriage articles the purpose of the instrument is itself sufficient to indicate the settlor's intention that the property is to go in strict settlement, but in a will an intention that words are not to have their strict meaning must appear from the instrument itself. Therefore, though the trust is executory, a direction to settle property on A. and the heirs of his body : *Seale v. Seale*, 1 P. W. 291 ; *Samuel v. Samuel*, 14 L. J. Ch. 222, 9 Jur. 222 ; or a devise in trust for A., with a direction to make a proper entail to the male heir by him, will not cut down A. to less than an estate tail. *Blackburne v. Stables*, 2 V. & B. 367 ; *Sweetapple v. Bindon*, 2 Vern. 536 ; *Harrison v. Naylor*, 2 Cox, 247 ; *Randall v. Daniell*, 24 B. 193 ; *Marshall v. Bousfield*, 2 Mad. 166 ; and see *Jervoise v. Duke of Northumberland*, 1 J. & W. 559.

How far
the rule in
Shelley's
case ap-
plies to
executory
trusts.

If, however, an intention is manifested not to use words in their strict legal sense, the trust will be executed so as to effect the general intention.

Such an intention is sufficiently indicated if the limitation is to A. for life, remainder to his heirs : *Meure v. Meure*, 2 Atk. 265 ; *Papillon v. Voice*, 2 P. Wms. 471 ; *Stonor v. Curwen*, 5 Sim. 264 ; *Hadwen v. Hadwen*, 23 B. 551 ; *Bastard v. Proby*, 2 Cox, 6 ; *Rochfort v. Fitzmaurice*, 2 D. & War. 1 ; *Trevor v. Trevor*, 1 H. L. 239 ; by a direction that the first taker should be unimpeachable for waste : *Papillon v. Voice*, 2 P. Wms. 471, Fearne, C. R. 115 ; by a direction that he shall not have power to bar the entail : *Leonard v. Earl of Sussex*, 2 Vern. 526, Fearne, C. R. 115 ; or that the property shall go over if the first taker dies without issue : *Shelton v. Watson*, 16 Sim. 543 ; *Thompson v. Fisher*, 10 Eq. 207 ; by the insertion of a general limitation to preserve contingent remainders not limited to a life : *Venables v. Morris*, 7 T. R. 342, 438 ; *Doe v. Hicks*, 7 T. R. 433 ; by a direction that a settlement shall be made as counsel shall advise, and

that issue are to take in succession, and according to priority. *White v. Carter*, 2 Ed. 366.

And the same result, it seems, will follow if the general scope of the limitations shows, that they were not to be literally adhered to. *Parker v. Bolton*, 5 L. J. Ch. 98; *Duncan v. Bluett*, 1. R. 4 Eq. 469.

As to the effect of a direction to make a strict entail, see *Graves v. Hicks*, 11 Sim. 536; *Sealey v. Stawell*, 1. R. 2 Eq. 326.

Direction to make a strict entail.

An executory trust to settle property upon such trusts as would correspond with the limitations of a barony granted by letters patent to several persons in succession and the heirs male of their bodies respectively, will be limited so as to give them only estates for life, the title being inalienable. *Sackville-West v. Viscount Holmesdale*, L. R. 3 Eq. 474, ib. 4 H. L. 543; *Lord Dorchester v. Earl of Effingham*, Sir G. Coop. 819, 10 Sim. 587 n., 3 B. 180 n.; *Woolmore v. Burrows*, 1 Sim. 512; *Banks v. Baroness Le Despencer*, 10 Sim. 576.

Direction to settle property to go with a title.

It seems clear that where chattels are directed to go as heirlooms, with real estate "as far as the rules of law and equity permit," these words will not make the trust executory, or enable the Court to mould the limitations of the personalty. *Christie v. Gosling*, L. R. 1 H. L. 279.

The words "as far as the rules of law permit" will not make a trust executory.

But if such a trust is clearly executory the Court will mould it so as to prevent the absolute vesting of chattels in a tenant in tail dying before coming into possession. See *Lady Lincoln v. Duke of Newcastle*, 12 Ves. 226, and see per Lord Chelmsford in *Christie v. Gosling*, L. R. 1 H. L. 290; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543.

Effect of such words where the trust is executory.

The Court will carry out in strict settlement an executory trust of family jewels directed to go as heirlooms to a succession of eldest sons "as far as the rules of law and equity will permit," though unconnected with limitations of real estate, and will insert provisoes against

vesting in any person who does not become entitled to possession and attain twenty-one. *Shelley v. Shelley*, 6 Eq. 540.

Direction
to settle
upon mar-
riage.

A mere direction to settle property upon marriage after an absolute gift is too vague to be carried out by the Court, and the absolute gift remains. *Magrath v. Morhead*, 12 Eq. 491.

But if there is any indication as to what the form of the settlement is to be, it will be carried out, whether the words are in *strict* settlement, or there is an indication that children are to be provided for. *Loch v. Bagley*, 4 Eq. 122; *Young v. Macintosh*, 13 Sim. 445; *Turner v. Sargent*, 17 B. 515; *Stanley v. Jackman*, 23 B. 450; *Stead v. Randall*, 2 Y. & C. C. 231; *Charlton v. Rendall*, 11 Ha. 296.

As to the form of settlement in such a case, see *Taggart v. Taggart*, 1 Sch. & L. 84; *Stanley v. Jackman*, 23 B. 450; *Young v. Macintosh*, 13 Sim. 445.

In what
cases
tenants for
life will be
unim-
peachable
for waste.

In the execution of executory trusts by the Court the question arises whether the tenants for life are to be punishable for waste or not.

1. Where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, the life estates are made unimpeachable for waste. *Leonard v. Earl of Sussex*, 2 Vern. 526; *White v. Briggs*, 15 Sim. 17, 2 Ph. 583.

And, therefore, where estates are directed to go to the support of a title granted to a man and the heirs of the body, the estate of the first taker being cut down to a life estate in execution of the trust, will be punishable for waste. *Woolmore v. Burroughes*, 1 Sim. 512; *Bankes v. Le Despencer*, 10 Sim. 576, 11 Sim. 508; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 548.

A direction that the trust is to be executed in strict settlement without more, *i. e.*, where no estate for life is expressly given, implies that the estates for life are to be dispunishable for waste. See *Davenport v. Davenport*, 1 H. & M. 775.

And, upon the same principle, if the trust is to be executed in strict settlement, powers which would diminish the estate will not be inserted under a direction to insert the usual powers. *Higginson v. Barneby*, 2 S. & St. 516; see *Sackville-West v. Viscount Holmesdale*, *supra*.

2. But if the testator has expressly, or by reference to other trusts, directed a life estate to be given, the power to commit waste will not be added to the life estate. *Davenport v. Davenport*, 1 H. & M. 775.

And if life estates are directed by the testator to be given, the words "in strict settlement" will not make the life estates dispunishable for waste. *Stanley v. Coulthurst*, 10 Eq. 259.

A direction to settle without power of anticipation is inconsistent with a power to commit waste. *Clive v. Clive*, 7 Ch. 433.

Property to be settled to the separate use of a married woman will be settled with a restraint upon anticipation. *Turner v. Sargent*, 17 B. 515; *Stanley v. Jackman*, 23 B. 450; *Re Dunnill's Will*, 1 R. 6 Eq. 322; see *Symonds v. Wilkes*, 11 Jur. N. S. 659.

Restraint
upon anti-
cipation.

A simple direction to settle will, it seems, authorise the insertion of powers of management, such as powers of leasing and sale and exchange. *Turner v. Sargent*, 17 B. 514.

What
powers will
be inserted
in a settle-
ment exe-
cuted by
the Court.

And where "usual powers" are expressly authorised, powers of leasing, of sale and exchange, and, if necessary, of partition and of leasing mines and granting building leases, will be inserted, but not powers to confer

personal privileges upon particular persons. *Peake v. Penlington*, 2 V. & B. 311; *Hill v. Hill*, 6 Sim. 136; see *Duke of Bedford v. Marquis of Abercorn*, 1 M. & Cr. 312, p. 334; *Higginson v. Barneby*, 2 S. & St. 516.

Where certain powers are given to tenants for life if qualified, and if not qualified, to trustees for them, general words will not authorise powers of sale and exchange. *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 437.

And where certain powers are given, general words will, as a rule, authorise only powers of a like nature; they will not, for instance, authorise the insertion of a power to grant building leases when a power to lease is expressly given. *Pearse v. Baron*, Jac. 158.

The general words may, however, be so placed as to show that their generality is not to be controlled. *London v. Fleetwood*, 6 Sim. 152.

CHAPTER XXXIV.

IMPLICATION.

IMPLICATION OF ESTATES TAIL.

IF there is a devise to A. simply, or to A. for life, followed by a gift over in default of issue, if these words import an indefinite failure of issue, A. takes an estate tail. *Machell v. Weeding*, 8 Sim. 4; *Daintry v. Daintry*, 6 T. R. 307. *In re Banks' Trusts*, 2 K. & J. 387.

Gift over upon an indefinite failure of issue gives the ancestor an estate tail.

And in wills before the Wills Act, if the limitation is to A. simply, or to A. for life, with a gift over in default of issue, A. will take an estate tail, though there are words which might constructively limit the failure of issue within a definite period, since this is the only construction which will carry anything to the issue. *Wylde v. Lewis*, 1 Atk. 432; *Simmons v. Simmons*, 8 Sim. 22, where the devise was in effect to A. for life, and if she dies without issue over, the power to appoint to issue being merely discretionary. *Butt v. Thomas*, 11 Ex. 235, 1 H. & N. 109.

The Court will not constructively limit the failure of issue, so as to prevent the implication of an estate tail.

Quære whether an estate tail will be implied in a person from a gift over in default of his issue simply, where no interest is given to him by the will. *Parker v. Tootal*, 11 H. L. 143; see *Walter v. Drew*, Com. Rep. 373.

Whether an estate tail will be implied from a gift over in default of a person who takes nothing under the will.

And where, in a devise to A. for life, remainder to his children either for life or in tail, an estate tail is implied in A. from a gift over in default of issue, the estate tail

Where an estate tail is implied, it will be in remainder after estates expressly limited.

As between father and son, an estate tail will be implied in the father.

so implied will be in remainder, to take effect after the prior estates expressly limited. *Doe d. Bean v. Halley*, 8 T. R. 5; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621, 3 Ad. & E. 340; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; *Andrew v. Andrew*, 1 Ch. D. 410.

And where an estate tail is to be implied either in an ancestor or his issue, it will be implied in the ancestor, so as to take in the whole line of issue. *Atkinson v. Barton*, 10 H. L. 213; *Forsbrook v. Forsbrook*, *supra*.

IMPLICATION OF LIFE ESTATES.

Devise to the heir-at-law after the death of A., gives A. a life estate.

I. If there is a devise of realty to the heir-at-law after the death of A., A. will take an estate for life by implication. It is evident that the heir who would take in case of intestacy is not meant to take immediately, and the only way of carrying out the testator's intention is to give A. a life estate. "A. must have the thing devised or none else can have it." *Gardner v. Sheldon*, Vaughan, 259, Tudor, L. C. 541.

But a devise to a stranger after the death of A. gives A. no estate by implication, since the heir-at-law may have been intended to take in the meantime. *Aspinall v. Petvin*, 1 S. & St. 544.

To raise an estate by implication, the person to take on the death of A., must be heir at the date of the devise.

Devise at the death of A. to one of several co-heiresses. Devise at

In order that A. may take a life estate the person to whom the lands are given after the death of A. must be the heir at law at the time of the devise, and not at the time when the devise takes effect. *Aspinall v. Petvin*, *supra*.

Similarly, a devise to one of several coheiresses after the death of A., gives A. a life estate. *Hutton v. Simpson*, 2 Vern. 723, as stated in *King v. Ringstead*, 9 B. & C. 218, p. 228.

And it seems that the result will be the same where the devise is to the heir and others after the death of A.

Blackwell v. Bull, 1 Kee. 176; see, too, *Cockshott v. Cockshott*, 2 Coll. 432.

The express gift of certain lands to A. does not in itself prevent him from taking other lands by implication. See 13 H. 7, f. 17; Brook, Devise, pl. 52, cited in *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. 541, 547.

Therefore, where lands are devised to A. for life, and after the death of A. the lands previously devised, together with other lands, are devised to B., A. will or will not take an estate for life by implication in the other lands, according as B. is the heir or a stranger. *Aspinall v. Petvin*, 1 S. & St. 544; *King v. Ringstead*, 9 B. & C. 218; *Attwater v. Attwater*, 18 B. 330.

But words which, taken in their grammatical sense, are joint and apply to the two classes of property, will be construed distributively if the intention of the testator is manifest that the lands not expressly devised for life are to go to the devisees at once. *Cook v. Gerard*, 1 Saund. 183, cit. 9 B. & C. 225; *Simpson v. Hornsby*, 2 Vern. 723; Prec. Ch. 439, 452; *Doe v. Brazier*, 5 B. & Ald. 64.

The mere fact that provision has already been made for A. will be an argument against giving a life estate by implication, and therefore in favour of a distributive construction. See *Stevens v. Hale*, 2 Dr. & Sm. 22; *James v. Shannon*, I. R. 2 Eq. 118.

Of course, if the devise after the death of A. can be construed as merely postponing the vesting in possession till the death of A., no argument in favour of implication can arise. *Barnet v. Barnet*, 29 B. 239.

And in the same way, if there is a residuary devise, so that nothing is undisposed of, there can be no implication. *Horton v. Horton*, Cro. Jac. 74.

II. By analogy to the rule with regard to real pro-

the death of A. to the heir and others. Whether an express devise to A. will prevent him from taking by implication.

Distributive construction where lands, in some of which A. takes a life estate, are given at his death to the heir.

No implication arises where vesting in possession only is postponed till the death of A. Effect of a residuary devise. Bequest of

personalty
to the next
of kin after
A.'s death.

perty, it appears that if personal property be given to the next of kin, or to one of the next of kin after the death of A., A. will take a life interest by implication, if there is no residuary bequest. *Stevens v. Hale*, 2 Dr. & Sm. 22; *Cock v. Cock*, 21 W. R. 807; *Blackwell v. Bull*, 1 Kee. 176. In *Horton v. Horton*, Cro. Jac. 74, there was in effect a residuary bequest according to the then state of the law.

A life es-
tate is
more
easily im-
plied in the
case of
personalty.

But the technical rule that the heir can be disinherited only by necessary implication, does not apply to personal property, with respect to which the presumption is if anything against an intestacy, and the cases almost seem to show that although the person to take upon the death of A. may be a stranger, A. will take a life estate by implication if there is nothing in the will to repel such construction. *Davies v. Hopkins*, 2 B. 276; *In re Betty Smith's Trusts*, L. R. 1 Eq. 79; *In re Blake's Trust*, L. R. 3 Eq. 799; *Humphreys v. Humphreys*, 4 Eq. 475; see, too, *Roe v. Summersett*, 5 Burr. 2608; *Bird v. Hunsdon*, 2 Sw. 342.

Effect of
an express
life estate
in certain
events.

But where an express life interest in certain events is given to persons after whose deaths the fund is given over, no implication arises in favour of those persons if the events do not happen. *Isaacson v. Van Goor*, 42 L. J. Ch. 193, 21 W. R. 156.

Effect of a
residuary
bequest.

A residuary bequest, or a gift in default of appointment where the bequest, after the life of A., is made under a power, is sufficient to repel the implication. *Cranley v. Dixon*, 23 B. 512; *Henderson v. Constable*, 5 B. 297.

No impli-
cation
arises in
favour of
A., where
the gift is,
if A. dies
under
twenty-
one, to B.

There is no implication in favour of A. where the gift is if A. dies under twenty-one or unmarried, since in such a case an absolute interest and not a life estate would have to be implied. *James v. Skannon*, 1 R. 2 Eq. 118; *Harris v. Du Pasquier*, 20 W. R. 668.

IMPLICATION OF ABSOLUTE INTERESTS.

1. If there is a gift to A. till twenty-one, with a gift over if he dies under twenty-one, A. will take by implication the fee, or an absolute interest in personalty, defeasible upon death under twenty-one. *Tomkins v. Tomkins*, cited 1 Burr. 234; *Paylor v. Pegg*, 24 B. 105; *Gardiner v. Stevens*, 30 L. J. Ch. 199; *In re Harrison's Estate*, 5 Ch. 408.

Devise to A. till twenty-one, with a gift over if he dies under twenty-one.

The argument in favour of implication is strengthened if the residuary devisees are different from those who would take under the gift over, so that without implication the property would go to different persons, according as A. died under or over twenty-one. *Cropton v. Davies*, L. R. 4 Ex. 159.

2. And even in the absence of a gift over, if there is anything to show that A. was intended to take after twenty-one, this intention will be carried out. *Wilks v. Williams*, 2 J. & H. 125; *Tunaley v. Roch*, 3 Dr. 720; *Atkinson v. Paice*, 1 B. C. C. 91; *Newland v. Shephard*, 2 P. Wms. 194; *Peat v. Powell*, Ambl. 387, 1 Ed. 479; these latter cases have, however, been disapproved of by Lord Hardwicke in *Fonnereau v. Fonnereau*, 3 Atk. 315; but they may probably be supported on the language of the will in each case.

General intention that the devisee was to take the whole interest.

3. But the implication will be rebutted if there are circumstances tending to show that the person to take till twenty-one is not to take an absolute interest if he survives twenty-one; if, for instance, the gift is to the wife for her and her son's support till the son attains twenty one, and if he dies under twenty-one, to the wife for life, and then over. In this case the son did not take the whole interest till twenty-one, and it could therefore hardly be implied that he was to take the whole after

Effect of a gift to A. till twenty-one, for the benefit of himself and another.

that age to the exclusion of his mother. *Fitzhenry v. Bonner*, 2 Dr. 36.

No implication in favour of children arises in a gift to A. absolutely, and if he dies without children, over.

4. No implication in favour of children arises upon an absolute gift of personalty to A., and if he dies without children over, or upon a gift to several as tenants in common, and if any die without issue, their shares to those then living or their children. *Addison v. Busk*, 14 B. 459, 2 D. M. & G. 810; *Cooper v. Pitcher*, 4 Ha. 485, 16 L. J. Ch. 24; *Dowling v. Dowling*, L. R. 1 Eq. 442, *ib.*, 1 Ch. 612.

Gift to A. for life, and if he dies without children, over.

5. Nor does any implication in favour of children arise if the gift is to A. for life, and if he dies without children over. *Greene v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 B. 200; *Sparks v. Restall*, 24 B. 218; *Neighbour v. Thurlow*, 28 B. 33; *Re Hayton's Trusts*, 4 N. R. 54.

6. But in this latter case, though the mere gift over in default of children will not be sufficient to give the children any interest by implication, the Court will, it seems, lay hold of any indication of intention to fortify the argument based upon the gift over, so as to give the children an interest. In the former case, where the absolute interest is given to the first takers, the "mere fact of a testator giving over property in case there are no children does not furnish any presumption on which this Court can act in favour of his giving it to the children, if there are any, as against their parents." *Dowling v. Dowling*, L. R. 1 Ch. 615. But where the parent takes only a life interest the children can take nothing from him, and at the same time the presumption against intestacy arises. It seems *Ex parte Rogers*, 2 Mad. 449, may be supported on this ground; see, too, *Kinsella v. Caffray*, 11 Ir. Ch. 154, where the gift over was not merely on death without issue, but upon such death, or upon death leaving issue, and such issue dying under twenty-one.

7. Apparently, where there is a gift to A. to dispose of among a certain class by deed or will, a life interest would be implied in A. *Acheson v. Fair*, 3 D. & War. 527. See *Williams v. Roberts*, 27 L. J. Ch. 177, 4 Jur. N. S. 18.

Gift to A. to dispose of among a certain class at his death.

8. When there is a gift to A. for life, remainder to such of her children as she may appoint, the power is looked upon as a trust, and if the parent does not appoint the property goes to the children equally. *Brown v. Higgs*, 8 Ves. 574; *Butler v. Gray*, 5 Ch. 26; *Kellett v. Kellett*, 1. R. 5 Eq. 298.

A power to a tenant for life to appoint to children is in effect a trust.

This does not apply if there is a gift over in default of appointment. *Pattison v. Pattison*, 19 B. 638; *Roddy v. Fitzgerald*, 6 H. L. 823; and see *In re Jeffery's Trusts*, 14 Eq. 136; nor where the power is to be exercised only in events which never happen. *Halfhead v. Shepherd*, 28 L. J. Q. B. 248, 5 Jur. N. S. 1162.

IMPLICATION OF CROSS-REMAINDERS.

1. If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe d. Gorges v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R. 3, Q. B. 655; *Hannaford v. Hannaford*, L. R. 7, Q. B. 116.

Cross-remainders will be implied where there is a devise to several in tail, followed by a gift over in default of all the issue to take under the preceding limitations.

And if the gift over is limited not expressly in default of issue, but as a remainder, the same result follows: *Doe d. Burden v. Burrille*, 2 East 47 n.; and the word reversion would probably now be held to have the same force, notwithstanding *Pery v. White*, Cowp. 777.

Where the gift over is limited as a remainder or reversion.

The arguments against the implication of cross-

remainders, founded upon the number of the devisees, and such words as severally or respectively, or the fact that *the whole* is not expressly given over, must now be considered as exploded.

Where the gift over is in default of issue to take under the preceding limitations living at the deaths of the ancestors.

Whether the limitation of cross-remainders in certain events prevents the implication of cross-remainders.

2. The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents. *Maden v. Taylor*, 45 L. J. Ch. 569.

3. It has been said that if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. *Clache's case* (Dyer, 330), however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks by the Lord Justice Turner in *Atkinson v. Barton*, 3 D. F. & J. 339. And the decision in *Rabbeth v. Squire*, 19 B. 77, 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Lord J. Turner:—"Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it." *Atkinson v. Barton*, 3 D. F. & J. 339 (reversed on appeal, but on different grounds, 10 H. L. 313); see, too, *Vanderplank v. King*, 3 Ha. 1; *Re Ridge's Trusts*, 7 Ch. 665.

Cross-re-

4. Cross-remainders will be implied even though, as

the result of legal rules, and not of the testator's intention, the class of persons between whom they are implied take different interests; if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank v. King*, 3 Ha. 1.

mainders implied between persons taking different interests.

5. Cross-remainders will be implied in a devise to the children of A., which carries to them only a life estate, with a gift over for want of such issue of A. *Ashley v. Ashley*, 6 Sim. 358.

Cross-remainders implied between tenants for life.

6. And where realty or personalty is given to several persons as tenants in common for life, with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. *Re Ridge's Trusts*, 7 Ch. 665; *Re Clark*, 11 W. R. 871; see, too, *Coates v. Hart*, 3 D. J. & S. 504.

Cross-remainders implied between the families where the limitations are for life, with remainder to children.

7. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth v. Squire*, 19 B. 70, 4 De G. & J. 406; *Re Clark*, 11 W. R. 871.

Cross-limitations will not be implied so as to divest vested interests.

Upon the same principle, when the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey v. Barnes*, 3 Mer. 334; *Bromhead v. Hunt*, 2 J. & W. 459; *Baxter v. Losh*, 14 B. 612; *Beaver v. Nowell*, 25 B. 551.

8. If, however, the interests are not vested, but contingent with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and

Gift over of contingent interests, if all the legatees die before the time of vesting.

therefore in all probability cross-limitations would be implied. *Mackell v. Winter*, 3 Ves. 236, 536; *Scott v. Bargeman*, 2 P. Wms. 68, 2 Eq. Abr. 542; *Graves v. Waters*, 10 Ir. Eq. 234.

There are no grounds for supposing *Scott v. Bargeman* to be overruled. The point in *Beauman v. Stock*, 2 Ba. and Be. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize v. Stoney*, 1 Dr. & War. 348, and followed in *Graves v. Waters*.

IMPLICATION BY RECITAL.

A recital that a person is entitled under another instrument does not amount to a gift.

Recital of a supposed gift by the reciting instrument is evidence of an intention to give.

Gift in addition to a supposed gift.

1. A recital, that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Harris v. Harris*, 1. R. 3 Eq. 610; *Circuit v. Perry*, 23 B. 275.

2. But a recital that the testator has by the very document containing the recital made a particular gift, which he has not in fact made, is evidence of an intention to confer the bounty. *Adams v. Adams*, 1 Ha. 537.

Thus a gift alleged to be "in addition" to a prior gift, where there is in fact no such prior gift, is sufficient evidence of an intention to confer the supposed prior gift. *Jordan v. Fortescue*, 10 B. 259; *Farrar v. St. Catherine's Coll.* 16 Eq. 24.

So a statement that the testator does not give a legatee a certain sum because she is absolutely entitled to it, when in fact it is in the disposition of the testator, amounts to a gift of the sum in question. *Hall v. Leitch*, 9 Eq. 376.

But a mere recital in a codicil of a supposed gift by will will not amount to a gift. *Re Arnold's Estate*, 33 B. 163, 171.

3. In order that rule 2 may apply it must be clear that there is nothing in the will to which the recital can refer. *Sherratt v. Oakley*, 7 T. R. 492; *Smith v. Fitzgerald*, 3 V. & B. 2; *Mackenzie v. Bradbury*, 35 B. 617, 620; *Nugent v. Nugent*, I. R. 8 Eq. 78; *Ives v. Dodgson*, 9 Eq. 401.

In order that a recital may operate as a gift, it must be clear that there is nothing to which it may refer. Recital will not cut down a prior express gift.

4. Still less can a gift be implied from a recital when the effect of such implication would be to cut down a prior express gift, as from a recital of a gift to B. for life, remainder to his children, when in fact the prior gift was to the children immediately. *Re Smith*, 2 J. & H. 594.

CHAPTER XXXV.

REVOCATION.

Revocation
before the
Wills Act.

PRIOR to the Wills Act a devise was revoked if the testator afterwards made a conveyance of the land for any purpose (except a mortgage), though the conveyance was only of the legal estate. *Lord Lincoln's Case*, Show. P. C. 154, 1 Eq. Ab. 411, pl. 11, 1 Jarman, 136—141.

Partition was no exception to the general rule where a conveyance was made to a trustee to divide, though, if the partition was effected by a mere release to uses, there was no revocation. *Grant v. Bridger*, L. R. 3 Eq. 347.

Effect of
the 23rd
section of
the Wills
Act.

Now, by the 23rd section of the Wills Act it is provided that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

The section
does not
apply to
cases of
ademption.

This section applies to cases in which a gift would have been formerly revoked by alteration of estate, but not to cases of ademption. *Moor v. Raisbeck*, 12 Sim. 123; *Ford v. De Pontes*, 30 B. 572.

The subject of revocation comes within the limits of the present treatise, only so far as it involves questions of construction. And even when thus limited the cases

are so special that they are of little use as general authorities, and hardly admit of a satisfactory classification.

The following general rules may, however, be laid down with regard to revocation :—

1. To cut down a previous gift it must be reasonably clear that it was meant to be cut down. The rule is not that the words of revocation must be as clear as the words of original gift. See *Randfield v. Randfield*, 8 H. L. 225 ; *Wallace v. Seymour*, 20 W. R. 634.

It must be reasonably clear that a bequest is meant to be revoked.

Thus, where property is given to A. for life, with remainders over, and the gift to A. only is revoked, but the property is given absolutely to B., the whole original gift is revoked. *Murray v. Johnstone*, 3 D. & War. 143 ; *Fry v. Fry*, 9 Jur. 894.

So, when there is a gift to A. with executory limitations over, and the trusts of the will as regards the gift to A. are revoked, the gifts over are revoked as well. *Boulcott v. Boulcott*, 2 Dr. 25.

2. The dispositions of the will will not be disturbed more than is necessary to give effect to a revocation by codicil.

Gifts will not be considered revoked further than is necessary.

Thus, where a legacy is charged on real and personal estate, and the charge on the personal estate is revoked by a codicil, the charge on the realty remains. *Kermode v. Macdonald*, 3 Ch. 585 ; *Leese v. Knight*, 12 W. R. 1097.

So, too, when land is given subject to a charge to A., and the devise is afterwards revoked, the charge remains. *Beckett v. Harden*, 4 Mau. & S. 1.

A legacy which is revoked is not set up again because the disposition in favour of which the revocation is made is incomplete or incapable of taking effect. *Tupper v. Tupper*, 1 K. & J. 665 ; *Nevill v. Boddam*, 28 B. 584 ; *Quinn v. Butler*, 6 Eq. 225 ; see *Onions v. Tyrer*, 1 P. Wms. 343, 2 Vern. 741.

Personalty directed to go upon the trusts of realty which are revoked.

When personalty is directed to go upon the same trusts as realty, and the trusts of the realty are afterwards revoked, the gift of the personalty remains. *Lord Beauclerk v. Mead*, 2 Atk. 167; *Darley v. Longworth*, 3 B. P. C. 359; *Agnew v. Pope*, 1 De G. & J. 49; *Martineau v. Briggs*, 23 W. R. 889. *Lord Carrington v. Payne*, 5 Ves. 404, would probably not be followed. See *Re Gibson*, 2 J. & H. 656.

But if the gift is of money to be laid out in repairing certain premises, and the surplus is given to the same persons to whom the premises are devised, and this latter devise is revoked, the gift of personalty also fails. *Whiteway v. Fisher*, 9 W. R. 433.

Erroneous recital will not revoke a gift.

3. A gift by will is not revoked by an erroneous recital of it by a codicil. *Re Smith*, 2 J. & H. 594; *Mann v. Fuller*, Kay, 624.

Revocation owing to an erroneous assumption of fact.

4. An alteration or addition to a gift in a will expressed to be made upon an assumption of fact, which turns out to be erroneous, does not take effect. *Campbell v. French*, 3 Ves. 321; *Doe d. Evans v. Evans*, 2 Per. & D. 378, 10 Ad. & E. 228; *Barclay v. Maskelyne*, Johns. 124.

But if the alteration or addition is made because the testator is doubtful whether some fact is true or not, the alteration takes effect. *A.-G. v. Lloyd*, 3 Atk. 552, 1 Ves. sen. 32; *A.-G. v. Ward*, 3 Ves. 327.

The distinction seems to be not between the fact and the testator's belief in the fact, but between a fact and a possibility which the testator is unable to verify, and therefore an additional gift founded upon an erroneous belief, would fall under the former head. *Thomas v. Howell*, 18 Eq. 198.

INCONSISTENCY.

When two clauses in a will are absolutely irreconcilable the later one is to be preferred. *Crone v. Odell*, 1 Ba. & B. 449, 3 Dow. 61; *Ulrich v. Lichfield*, 2 Atk. 372; *Morrall v. Sutton*, 1 Ph. 533; *Paice v. Archbishop of Canterbury*, 14 Ves. 366.

The later of two inconsistent gifts takes effect.

But if possible the Court will reconcile two dispositions apparently inconsistent. See *Kerr v. Baroness Clinton*, 8 Eq. 462.

Thus, if the same property is given to two persons in fee in two different parts of the will, they will take as joint tenants. *Paramour v. Yardley*, Plow. 541; *Bennett's Case*, Cro. Elis. 9; see *Sherratt v. Bentley*, 2 M. & K. 149, 162.

Gift of the same property to two persons.

This does not, however, apply as between will and codicil. *Re Hough's Estate*, 15 Jur. 943, 20 L. J. Ch. 422; *Evans v. Evans*, 17 Sim. 107.

So, too, if land is given to one person without, and to another person with, words of limitation, the latter will take a fee in remainder. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

Similarly where immediate interests in fee and in tail or in fee and for life are given in the same lands, the devise of the fee will be construed as a remainder whether the devise of particular estate precedes the devise of the fee or not. *Wallop v. Derby*, Yelv. 209; see *Conquest v. Conquest*, 16 W. R. 453.

In cases where the whole personalty is given to a person absolutely, and then there is a gift of the residue at her decease, the earlier gift has been held to be for life only. *Sherratt v. Bentley*, 2 M. & K. 149; *Re Brook's Will*, 13 W. R. 573.

Gifts of the testator's whole estate, and of a residue in the same will.

And the same construction has been adopted where there were no words referring to the death of the first

legatee, but the gift was to her children. *In re Bagshaw's Trusts*, 24 W. R. 875.

Gifts of the residue and of the remainder in the same will.

So, if a testator gives the remainder of his property to A., and makes B. his residuary legatee, B. will take only lapsed legacies. *Re Jessop*, 11 Ir. Ch. 424; *Dawes v. Bennett*, 30 B. 226; *Kelvington v. Parker*, 21 W. R. 121.

But a residuary gift by codicil revokes a residuary gift by will. *Earl of Hardwicke v. Douglas*, 7 C. & F. 795.

Gifts of all the testator's property, followed by gifts of portions of it.

Similarly, a gift of all the testator's property, followed by gifts of specific portions of it, or *vice versa*, may both take effect. *Cuthbert v. Lempriere*, 3 Mau. & S. 158; *Doe d. Snape v. Nevile*, 11 Q. B. 466; *Blamire v. Geldart*, 16 Ves. 314; *In re Arrowsmith's Trusts*, 8 W. R. 555, 2 D. F. & J. 474; *Robertson v. Powell*, 3 N. R. 433.

Where, however, all the testator's personal property was given to his widow for life, subsequent legacies were held to be not payable till after her death. *Burdett v. Young*, 9 Mad. 93, 5 B. P. C. 54.

As between will and codicil, the argument is in favour of revocation.

As between a will and codicil, however, the argument is much stronger in favour of revocation. At any rate, where a testator by his will distinguishes between specific legacies and residue, and by a codicil gives all his personal property, the codicil revokes the specific legacies as well as the residuary gift. *Kermode v. Macdonald*, L. R. 1 Eq. 457, 3 Ch. 584.

CHAPTER XXXVI.

ALTERING WORDS.—UNCERTAINTY.

CHANGING WORDS.

THE Court will change a word when it appears from the context of the will that the word was incorrectly employed by the testator in place of some other word.

Several cases in which "or" has been changed into "and" and *vice versa*, have already been mentioned in the discussion of the construction of gifts over. It remains to mention some cases in which a similar change has been made in direct gifts.

When there is a gift to a person upon one or other of two events, "or" will not be read "and," as the result would be to make the conditions cumulative instead of alternative. *Hawksworth v. Hawksworth*, 27 B. 1.

And it seems in a condition precedent to vesting "nor" will mean or not, if the result is to vest the gift in either of two events. *Mackenzie v. King*, 12 Jur. 787, 17 L. J. Ch. 448.

On the other hand, in some cases on the context of the will "and" has been read "or," so as to vest a gift in alternative in lieu of cumulative events. *Hawes v. Hawes*, 1 Ves. sen. 13; *Jackson v. Jackson*, 1 Ves. sen. 216; *Stapleton v. Stapleton*, 2 Sim. N. S. 212, with which compare *Malmesbury v. Malmesbury*, 31 B. 407; *Maynard v. Wright*, 26 B. 285.

"Or" will not be changed into "and" in a condition precedent.

"Nor" may mean "or not."

"And" changed into "or" upon the context.

"Fourth"
changed
into
"Fifth."

Upon the same principle the Court has changed the word fourth into fifth, where it was clear upon the construction of the whole will that the testator intended to refer to the fifth and not to the fourth schedule. *Hart v. Tulk*, 2 D. M. & G. 300. See *Surtees v. Hopkinson*, 4 Eq. 98.

SUPPLYING WORDS.

With regard to supplying words in a will the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it, or supplying some word, while at the same time the latter course will make the will consistent, the Court will be justified in making the necessary addition.

Limitation
to the
second and
other sons
supplied.

Thus, in a devise to A. for life, remainder "to the first son of A. severally and successively in tail male," the devise will be construed as to the first and other sons of A. *Parker v. Tootal*, 11 H. L. 143. See *Newburgh v. Newburgh*, Lord St. Leonards' Law of Property, 367.

Limitation
to daugh-
ters sup-
plied in a
marriage
settlement.

So, too, where there was a limitation in a settlement to the children of the marriage who, being a son or sons, should attain twenty-one years; and if there should be but one such child, the whole to be in trust for such one child, his *or her* executors and administrators, and there were powers of applying the presumptive share of every such child for his *or her* maintenance until his *or her* share should become vested, the Court held daughters to be included in the gifts. *In re Daniel's Settlement Trusts*, 1 Ch. D. 375.

The words
"without
issue" sup-
plied, so as
not to di-
vest a
prior estate
tail.

Similarly, when there is a gift to A. in tail, and if he die over, the words without issue will be supplied in the gift over to satisfy the implied contingency. *Anon.* 1 And. 33.

And, in a similar case, where there were devises to several in tail, and the interest of one of the tenants in tail was given over to another, "if he died living Alice," the words without issue were supplied, there being a gift over of the whole upon death of all the tenants in tail without issue. *Spalding v. Spalding*, Cro. Car. 185.

The extreme limit to which the Court will go in supplying words in such cases is probably marked by *Abbott v. Middleton*, 7 H. L. 68. The gift there was of personalty to the testator's wife for life, and then to his son for life, with remainder to the son's children, and "in case of my son dying before his mother" over. The son died, leaving a child, and the House of Lords held (diss. Lords Cranworth and Wensleydale) that the words "without children" must be supplied in the gift over, so as to leave the child of A. in possession of the property.

*Abbott v.
Middleton.*

However, if the testator expressly distinguishes death in the lifetime of a tenant for life from death without issue, if, for instance, the gift over is either in the event of death before the tenant in tail, or in the event of death without issue at any time, the gift over must be literally construed. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

UNCERTAINTY.

If it is impossible to ascertain the subject-matter, or the objects of a gift, it will be void for uncertainty.

Thus, a gift of some of my linen, not saying how much, or of a handsome gratuity, is void. *Peck v. Halsey*, 2 P. Wms. 387; *Jubber v. Jubber*, 9 Sim. 503. See *Jones d. Henry v. Hancock*, 4 Dow. 145.

A bequest
of indefi-
nite
amount is
void.

On the other hand, if the testator supplies a measure of the bequest, the Court will ascertain how much ought to be expended; thus, a gift of a sum of money to an

executor for his trouble, or even of a house or garden to be built at the expense of his executors, is good, and the Court will fix the amount. *Jackson v. Hamilton*, 3 J. & Lat. 702; *Edwards v. Jones*, 35 B. 474. See *Magistrates of Dundee v. Morris*, 3 Macq. 134.

Gift of a sum not exceeding a certain amount.

A gift of 50*l.* or 100*l.*, or of a sum not exceeding a certain amount, will be construed in favour of the legatee as a gift of the larger sum. *Seale v. Seale*, 1 P. Wms. 290; *Thompson v. Thompson*, 1 Coll. 395; *Cope v. Wilmot*, 1 Coll. 396 *n.*; *Gough v. Bult*, 16 Sim. 45.

Gift of the rest of a fund when the rest cannot be ascertained.

Upon similar principles the gift of the rest of a fund, if the rest cannot be ascertained, is void; as in a devise of such houses as she shall select to A. and the others to B., where A. dies before the testator. *Boyce v. Boyce*, 16 Sim. 476; *Jerningham v. Herbert*, 4 Russ. 388.

In the same way, if there is a gift of the residue after providing for an object, which is void or fails, the gift of the residue will itself be void, if it is impossible to ascertain the amount necessary and required for the void purpose. *Chapman v. Brown*, 6 Ves. 404; *Mitford v. Reynolds*, 1 Ph. 185, and 16 Sim. 105; *Fowler v. Fowler*, 33 B. 616.

The Court will, if possible, ascertain what the residue would have been.

The Court will, however, if possible, ascertain the amount necessary for the purpose, to prevent the gift of residue from being void for uncertainty. *Mitford v. Reynolds*, 1 Ph. 185; *Fisk v. A.-G.*, 4 Eq. 521.

CHAPTER XXXVII.

SATISFACTION AND ADEPTION.

SATISFACTION.

WHEN a parent, or a person *in loco parentis*, has covenanted to pay a portion to a child, and afterwards gives a legacy of the same or a larger amount to that child, the legacy is *prima facie* a satisfaction of the portion, and if the legacy is of smaller amount it is a satisfaction *pro tanto*. *Warren v. Warren*, 1 B. C. C. 805, 1 Cox, 41.

Satisfac-
tion of
portions by
legacies.

Satisfaction, however, only arises between a gift and a prior liability to give, and not between a sum actually settled and a subsequent gift by will or otherwise. *Samuel v. Ward*, 22 B. 347.

Satisfac-
tion arises
between a
gift and a
liability to
give.

On the other hand, when there is a gift by will to a child, and the testator afterwards in his lifetime gives the child a sum of money, the bequest is adeemed *pro tanto*.

Satisfac-
tion and
adeption
distin-
guished.

The difference between the two cases is, that in the former case the portion which the testator has covenanted to pay can only be satisfied by the bequest with the consent of the objects of the covenant; in the latter case the gift by will is revocable, and the testator may substitute for it any form of gift he pleases.

Again, in the former case, the question whether the gift by will was intended to be a satisfaction of the covenant is a question of testamentary intention; in the latter

the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself.

Lastly, in cases of satisfaction, election must always arise ; in cases of ademption it never can.

It follows that the presumption that a gift by will is intended to be a satisfaction of a prior covenant to pay a portion is more easily rebutted than the similar presumption in the case of ademption.

Thus, the fact that the objects of the gift by will are not the same as the objects of the covenant, is a stronger argument against satisfaction than against ademption, as the testator cannot be supposed to have wished to do by his will what it was out of his power to do, though, on the other hand, the argument is inconclusive, since the bequest by will may be intended as a satisfaction with regard to some of the objects of the covenant, leaving such of them as take nothing under the will to their rights under the covenant.

Covenant
to settle
for life
satisfied by
absolute
bequest.

Thus, a covenant to settle a certain share upon a son for life, and then upon trusts for the benefit of his wife and children, is satisfied as regards the son by a bequest to him absolutely. *McCarogher v. Wilson*, 3 Eq. 236.

Covenant
to settle in
remainder
satisfied by
immediate
bequest.

So, too, a direct bequest to grandchildren is, as regards the grandchildren, a satisfaction of a covenant to settle a sum upon a daughter and her husband for their lives, and the life of the survivor, remainder to their children as they should appoint, and in default of appointment to the children equally. *Campbell v. Campbell*, L. R. 1 Eq. 383.

Legacies in
lieu of
claims
under the
settlement.

The fact that legacies to the testator's widow are declared to be in lieu of her claim under the settlement will not rebut the presumption against double portions in the case of legacies to children without any such declaration. *Ackworth v. Ackworth*, cited 3 Ves. 527, 1 B.

C. C. 307 n.; *Moulson v. Moulson*, 1 B. C. C. 83; see, too, *Finch v. Finch*, 1 Ves. jun. 534, where the legacy was expressed to be for a portion.

The presumption of satisfaction may be rebutted by the difference in the thing given by the will and covenanted to be settled.

Satisfac-
tion re-
butted by
the dif-
ference be-
tween the
subject-
matter of
the cove-
nant and
bequest.

a. Thus a devise of land is no satisfaction of a covenant to pay money, unless the lands are expressly estimated by the testator in money. *Goodfellow v. Burchett*, 2 Vern. 298; *Bengough v. Walker*, 15 Ves. 507.

But the fact that the gift by will is of a share of residue will not prevent the gift being a satisfaction of a portion. *Lady Thynne v. Earl of Glengall*, 2 H. L. 131.

Portion
satisfied by
gift of
residue.

b. A contingent legacy is no satisfaction of a vested portion. *Bellasis v. Uthwait*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 B. C. C. 352; *Pierce v. Locke*, 3 Ir. Ch. 205, 215.

Contingent
legacy and
vested por-
tion.

The presumption of satisfaction will not be rebutted by slight differences between the covenant and the will; as, for instance, differences in the mode of payment, the covenant being to pay on the widow's death the will within three months of her death. *Sparkes v. Cator*, 3 Ves. 530; *Copley v. Copley*, 1 P. Wms. 146.

Differences
between
the cove-
nant and
the will in-
sufficient
to rebut
satisfac-
tion.

Or by the fact that the covenant contains a provision for children dying before their portions are payable, and the will does not. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

Or that the settlement gives a power to the husband and wife jointly, while the will gives it to the wife alone. *Thynne v. Earl of Glengall*, 2 H. L. 131; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

Or that the settlement is upon children of the daughter by a particular marriage, whereas the gift by will is to all the children. *Thynne v. Earl of Glengall, sup.*; *Russell v. St. Aubyn*, 2 Ch. D. 398.

A restraint upon anticipation will not rebut satisfaction,

nor will the fact that the will gives a remainder to children in fee, the covenant being to them in tail. *Weall v. Rice*, 2 R. & M. 251.

Nor will the fact that the gift by will gives the wife the first life estate, whereas the covenant gives it to the husband. *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

Nor the fact that the life estate given to the husband by the will is determinable on bankruptcy or alienation, there being no such liability to determine in the covenant. *Russell v. St. Aubyn*, *sup.*

What
amount of
difference
is sufficient
to rebut
satisfac-
tion.

But a legacy to a daughter for life for her separate use, and after her decease, in case her husband should be living, for such persons exclusive of her husband as she should appoint, and in case he should die in her lifetime to her appointment, is not a satisfaction of a covenant to settle on trust to pay a part to the daughter for pin-money, and the rest to the husband for life, and if the daughter survive him to her for life, remainder to the children of the marriage as she shall appoint. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71.

Direction
to pay
debts.

It seems that a direction in the will to pay debts, or debts and legacies, would not alone rebut the presumption of satisfaction, though great stress has been laid upon it, and, coupled with other circumstances, it will have that effect. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Paget v. Grenfell*, 6 Eq. 7.

Covenant
in the
nature of a
debt.

Again, when the portion covenanted to be paid is in the nature of a debt due to the husband, or the trustees of the settlement, the presumption of satisfaction is more easily rebutted.

Thus, in *Hall v. Hill*, 1 Dr. & War. 94, a legacy to the daughter was held to be no satisfaction of a bond to the husband on the marriage of the daughter. See, too, *Chichester v. Coventry*, *supra*.

SATISFACTION IN THE CASE OF STRANGERS.

In the case of gifts by strangers, there is no presumption against double portions, and a question of satisfaction can only arise upon the express declaration of the donor, that subsequent gifts by him are to go in satisfaction of what he has given by the instrument containing the declaration.

Express declaration that legacies are to be in satisfaction.

In such cases the question has arisen whether a provision by will is to be considered an advancement in the lifetime of the testator.

Whether provision by will is an advancement in the testator's lifetime.

There can be no doubt that, where there is a declaration that gifts made by a father "in his lifetime or by his will," or "in his life or at his death," are to go in satisfaction, provision by will would be included in these words. *Papillon v. Papillon*, 11 Sim. 642; *Rickman v. Morgan*, 1 B. C. C. 63, 2 B. C. C. 393.

But there is no such rule as that supposed to have been laid down by Lord Eldon in *Leake v. Leake*, 10 Ves. 476, p. 488, that a provision by will is to be considered as an advancement in the lifetime of the party. Whether it is or not depends on the language of the declaration.

Thus, a declaration that if the father should during his life advance or pay any sums for the benefit of his children, the sums so advanced should be taken *pro tanto* in satisfaction of the portions of his children, will not include gifts by will. *Cooper v. Cooper*, 8 Ch. 813; see *Douglas v. Willes*, 7 Ha. 318.

Though, on the other hand, the words may be large enough to include provision by will; where, for instance, the proviso is, if the father should have bestowed or given portions to his children on their marriage, "or otherwise provided for them." *Leake v. Leake*, 10 Ves. 477.

And the words "settle, give, or advance" have been held to include provision by will: *Onslow v. Mitchell*, 18

Ves. 490 ; see, too, *Golding v. Haverfield*, 13 Pr. 593, M'Cl. 345 ; *Fazakerley v. Gellibrand*, 6 Sim. 591 ; but the authority of these cases must be looked upon as doubtful since *Cooper v. Cooper*.

A devise of lands is not within a proviso that sums of money advanced are to be taken in satisfaction, nor is a gift to the trustees of the marriage settlement of the donee, and not the donee personally. See Lord Romilly's judgment, *Cooper v. Cooper*, 6 Ch. 820 n.

Declaration that advances are to be in satisfaction, unless the contrary is directed in writing.

Where sums advanced are directed to be taken in satisfaction, unless the contrary is directed in writing by the person making the advance, the declaration to the contrary need not be express, but may be gathered from the general terms of the instrument by which the advance is made. *Leake v. Leake*, 18 Ves. 494 ; *Fazakerley v. Gellibrand*, 6 Sim. 591.

SATISFACTION OF DEBTS.

Legacy of equal or greater amount is a satisfaction of a debt.

The doctrine of satisfaction also applies to a legacy to a debtor. In such a case the legacy, if of equal or greater amount, is *prima facie* considered a satisfaction of the debt. *Talbot v. Shrewsbury*, Prec. Ch. 394 ; *Fowler v. Fowler*, 3 P. Wms. 353.

The general rule has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention that it is of small practical importance.

1. As to what debts may be satisfied by legacies :—

The debt must exist at the date of the will.

a. The debt to be satisfied must be a debt existing at the date of the will. *Cranmer's Case*, 2 Salk. 508 ; *Thomas v. Bennett*, 2 P. Wms. 343 ; *Plunkett v. Lewis*, 3 Ha. 330.

The debt must be certain.

b. The testator must have been certain at the date of the will that a debt was due, and to whom it was due, and therefore a mere liability on a current account, or on

a negotiable instrument, such as a bill of exchange, will not be satisfied by a legacy. *Rawlins v. Powell*, 1 P. Wms. 297; *Carr v. Eastbrooke*, 3 Ves. 561.

But the fact that the debt is liable to decrease makes no difference. *Edmunds v. Low*, 3 K. & J. 318.

2. As to what legacies will not be considered to satisfy debts :—

a. A legacy of smaller amount is no satisfaction of a debt. *Cranmer's Case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 478; *Eastwood v. Vinke*, 2 P. Wms. 614; *Gee v. Liddell*, 35 B. 621; see *Richardson v. Elphinstone*, 2 Ves. jun. 468. Legacy of smaller amount is no satisfaction of a debt.

b. Nor is a gift of residue. *Barrett v Beckford*, 1 Ves. sen. 519. Gift of residue,

c. Nor is a gift of a contingent legacy. *Tolson v. Collins*, 4 Ves. 482; *Matthews v. Matthews*, 2 Ves. sen. 635. of a contingent legacy.

3. Satisfaction is also rebutted by the difference in the nature of the legacy and the debt.

a. As where the debt is by bond and the testator devises land. *Eastwood v. Vinke*, 2 P. Wms. 614; *Richardson v. Elphinstone*, 2 Ves. jun. 468. Debt by bond is not satisfied by a devise of land.

b. If the legacy is less advantageous than the debt; if, for instance, the legacy is payable in six months, the debt in one: *Haynes v. Mico*, 1 B. C. C. 129; *Deveze v. Pontet*, 1 Cox, 188; *Adams v. Lavender*, M'Cl. & Y. 41; or the legacy is payable half-yearly, the debt quarterly: *Atkinson v. Webb*, Prec. Ch. 236; if the debt is secured, the legacy not: *Wood v. Wood*, 7 B. 183; or the debt is a first charge, the legacy not: *Hales v. Darell*, 3 B. 324; if the debt is to the separate use, the legacy not. *Bartlett v. Gillard*, 3 Russ. 149; *Rowe v. Rowe*, 2 De G. & S. 294; *Fourdrin v. Gowdey*, 3 M. & K. 409; but see *Atkinson v. Littlewood*, 18 Eq. 595. Debt not satisfied when the legacy is less advantageous.

c. If the legacy is expressed to be given in satisfac- Legacy in

lieu of
dower.

tion of dower. *Pinchin v. Simms*, 30 B. 119; *Glover v. Hartcup*, 34 B. 74.

Debt due
to one set
of trustees,
legacy to
another.

d. The fact that the debt is due to one set of trustees, and the legacy is given to another, is a circumstance to be considered, but apparently not alone decisive. *Pinchin v. Simms*, 30 B. 119; *Smith v. Smith*, 3 Giff. 121; and see *Atkinson v. Littlewood*, 18 Eq. 595.

Direction
to pay
debts and
legacies.

e. The presumption will be rebutted by a direction to pay "debts and legacies." *Chancey's Case*, 1 P. Wms. 408; *Lethbridge v. Thurlow*, 15 B. 334; *Richardson v. Greese*, 3 Atk. 65; *Field v. Mostin*, 2 Dick. 543; *Jefferies v. Michell*, 20 B. 15; *Hassell v. Hawkins*, 2 Dr. 469.

But not if the direction is in the will, and a debtor whose debt is incurred subsequent to the will receives a legacy by a codicil. *Gaynon v. Wood*, 1 P. Wms. 409 *n.*

Whether a debt payable within three months of the testator's decease would be within the direction to pay debts seems doubtful. In *Wathen v. Smith*, 4 Mad. 325, it was held not; on the other hand Lord Romilly, in *Cole v. Willard*, 25 B. 568, disapproved of this decision. See, too, *Atkinson v. Littlewood*, 18 Eq. 595.

Direction
to pay
debts only.

f. Whether a direction to pay "debts" only will have the effect of rebutting the presumption of satisfaction seems doubtful. There is no case deciding that it will, and there is the express decision of Lord Hatherley as V.-C., that it will not, *Edmunds v. Low*, 3 K. & J. 318. Against this must be set the dicta of Lord Romilly, in *Cole v. Willard*, 25 B. 568; *Pinchin v. Simms*, 30 B. 119; and of V.-C. Malins in *Atkinson v. Littlewood*, 18 Eq. 595. All the cases, however, show that a direction to pay debts only is a circumstance to be taken into account.

ADEMPTION.

As ademption arises from acts subsequent to the will, there can be no expression of intention contained in the will as to whether a subsequent gift was meant to be an ademption or not, the question is therefore not properly within the limits of the present treatise. For the sake of convenience, however, it may be useful to notice a few of the more important points arising with reference to this subject.

A bequest to a child or person to whom the testator has placed himself in *loco parentis* is adeemed by a subsequent gift to the legatee in the testator's lifetime, unless the nature of the two is so different as to rebut the presumption. *Leighton v. Leighton*, 18 Eq. 459; see *Boyd v. Boyd*, 4 Eq. 305; *Taylor v. Taylor*, 20 Eq. 155.

Ademption
of legacies
by ad-
vances.

A gift of less amount than the legacy is an ademption *pro tanto*. *Pym v. Lockyer*, 5 M. & Cr. 29.

For the purposes of ademption the value of the advance is to be taken as at the time it was made. *Watson v. Watson*, 33 B. 576.

Ademption applies as well to a gift of residue as to general legacies, though in the case of residue it will be applied only between children against a child in favour of a child, and not in favour of a stranger. *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Meinertzen v. Walters*, 7 Ch. 670.

Ademption
in the case
of a resi-
due.

Differences in the time of payment of the legacy and the portion are immaterial. *Hartopp v. Hartopp*, 17 Ves. 184; *Stevenson v. Masson*, 17 Eq. 84.

Advances, however, for some particular purpose, as to buy a wedding outfit or small occasional presents, or even a small annual allowance will not adeem legacies by will. *Ravenscroft v. Jones*, 32 B. 669; *Watson v. Watson*, 33 B. 574; *Schofield v. Heap*, 27 B. 93.

Small ad-
vances for
a particu-
lar pur-
pose will
not adeem
a legacy.

As in the case of satisfaction the presumption of ademption may be repelled by the difference in the subject matter of the two gifts.

Legacy of money not adeemed by a gift in stock-in-trade.

Thus there will be no ademption if the legacy is money and the gift is stock-in-trade. *Holmes v. Holmes*, 1 B. C. C. 555. See *Davis v. Boucher*, 3 Y. & C. Ex. 411; *Pym v. Lockyer*, 5 M. & C. 48.

Vested legacy and contingent advance.

Nor if the legacy is certain and the gift is contingent. *Spinks v. Robins*, 2 Atk. 493; *Crompton v. Sale*, 2 P. Wms. 553.

A legacy is adeemed by a subsequent settlement.

A bequest of a sum of money to a child absolutely is adeemed by the subsequent settlement of that or a larger amount on the marriage of the child; if a smaller amount is settled, it is an ademption *pro tanto*. *Lord Durham v. Wharton*, 3 Cl. & F. 146; *Stevenson v. Masson*, 17 Eq. 78.

And even if the legacy be given to the child for life with remainder to her children, a subsequent gift to her absolutely is an ademption. *Kirk v. Eddowes*, 3 Ha. 509.

Advance to a child will not adeem a substitutional bequest to his issue.

But where there is a substitutional gift to the issue of a child dying in the testator's lifetime, a subsequent advancement to a child who dies in the testator's lifetime leaving issue will not operate as an ademption of the gift to the issue. *Rose v. Rogers*, 39 L. J. Ch. 791; *Hewitt v. Jardine*, 14 Eq. 58.

Gift to the husband for the purposes of the marriage adeems a legacy to the daughter.

And a sum given to a daughter's husband in consideration of his making a settlement upon her, or for the purposes of the marriage, is an ademption of a legacy to the daughter. *Lord Durham v. Wharton*, 3 Cl. & F. 146; see *Nevin v. Drysdale*, 4 Eq. 517.

But a gift to the husband absolutely, though expressed to be a portion for a daughter, is not an ademption of a legacy to the daughter and her children. *Ravenscroft v. Jones*, 32 B. 669; *Cooper v. Macdonald*, 16 Eq. 258.

The fact that the legacy to the child is given over in certain events will not prevent a subsequent gift to the child absolutely, or a settlement upon her marriage from adeeming the legacy, both as regards the child and the persons interested under the gift over. *Twining v. Powell*, 2 Coll. 262; *Dawson v. Dawson*, 4 Eq. 504; *Cooper v. Macdonald*, 16 Eq. 258.

An absolute gift may adeem a legacy given with executory gifts over.

An adeemed legacy is not revived by a codicil republishing the will. *Powys v. Mansfield*, 3 M. & Cr. 376; see *Ravenscroft v. Jones*, 4 DeJ. & S. 228.

An adeemed legacy is not revived by a codicil.

An advance made before the date of the will will not operate as an ademption in the absence of a special agreement that it shall. *Upton v. Prince*, Cas. temp. Talb. 71; *In re Peacock's Estate*, 14 Eq. 236.

Advances made before the date of the will.

Where a legacy is given for a particular purpose, whether to a stranger or not, and the testator afterwards in his lifetime satisfies that purpose, the legacy is adeemed. *Debeze v. Mann*, 2 B. C. C. 519; *Monck v. Monck*, 1 Ba. & Be. 298; *Powys v. Mansfield*, 3 M. & C. 359.

Legacies given for a purpose are adeemed if the testator satisfies the purpose.

But it must appear on the face of the will that the legacy is for a particular purpose. *Pankhurst v. Howell*, 6 Ch. 136.

CHAPTER XXXVIII.

INTERESTS UNDISPOSED OF.

LAPSE.

PORTIONS of a testator's property may be undisposed, either because the disposition attempted by him has failed, or because no disposition has been attempted.

Doctrine of
lapse.

A devise or legacy, whether it be of a debt due to the testator or not, lapses by the death of the devisee or legatee before the testator, or even before the date of the will. *Elliott v. Davenport*, 1 P. Wms. 83, 2 Vern. 581; *Maybank v. Brooks*, 1 B. C. C. 84; *Re Clements*, 36 L. J. Ch. 171, 15 W. R. 250.

So a devise by A. to the uses of B.'s will can only take effect in favour of those who survive A. *Culsha v. Cheese*, 7 Ha. 245.

The doctrine of lapse applies to a power of appointment exercised by will, and the appointee must survive the donee of the power in order to take. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 61; *Freeland v. Pearson*, L. R. 3 Eq. 658.

An appointment by will in accordance with a covenant is subject to the ordinary rule as to lapse. *Re Brookman's Trust*, 5 Ch. 182; see *Jervis v. Wolferstan*, 18 Eq. 18.

Legacies to
creditors
whose
debts are
barred.

With regard to legacies to creditors of the testator in discharge of debts which have been released by the operation of the bankruptcy laws, or by lapse of time:

1. A gift to the official assignee in bankruptcy in trust to pay debts will not fail as regards creditors who die in

the testator's lifetime, though the debts are barred by the Statute of Limitations as well as discharged by a certificate in bankruptcy. *In re Sowerby's Trusts*, 2 K. & J. 630, 7 D. M. & G. 429.

2. Nor will the gift of a sum to be divided among creditors, though the debts may be barred by the Statute of Limitations, if they have not been released by the creditors. *Williamson v. Naylor*, 3 Y. & C. Ex. 208; *Phillips v. Phillips*, 3 Ha. 281.

3. On the other hand, if the gift is not through the medium of the assignee, and the debts have been released or extinguished, the gift is mere bounty, and will fail as regards the creditors dying in the testator's lifetime: *Coppin v. Coppin*, 2 P. Wms. 295; but the authority of this case is very doubtful. And see *Golds v. Greenfield*, 2 Sm. & G. 476.

A declaration that a legacy shall not lapse is not sufficient to prevent lapse, unless it is clear that it is to go to the estate of the legatee in the event of his death. *Pickering v. Stamford*, 3 Ves. 493; *Johnson v. Johnson*, 4 B. 318; *Underwood v. Wing*, 4 D. M. & G. 633; see *Wilder's Trusts*, 27 B. 418.

Effect of a declaration against lapse.

But a gift to A. and his executors or administrators, with a direction that the legacy is not to lapse has been held sufficient. *Sibley v. Cook*, 2 Atk. 572.

On the other hand, in the case of a gift in similar terms, a direction that the legacy was to vest from the date of the will was held insufficient to prevent lapse. *Browne v. Hope*, 14 Eq. 343.

The interest of persons taking in default of appointment does not fail by the death of the donee of the power before the testator. *Hardwick v. Thruston*, 4 Russ. 380; *Edwards v. Saloway*, 2 Ph. 625; *Nicholls v. Haviland*, 1 K. & J. 504; *Kellett v. Kellett*, 1 R. 5 Eq. 298.

Interests of persons to take in default of appointment will not fail by the death of the donee of the power.

Nor do the interests of those taking in remainder,

Interests of persons in remainder not affected by lapse of the life interest.

Whether a gift to A. or his executors will lapse.

Charges will not fail by the death of the devisee subject to the charge.

Effect of sections 32 and 33 of the Wills Act on the doctrine of lapse.

though they may be the next of kin of the tenant for life, unless the subsequent limitations are only a settlement of a previous absolute interest. Cases *supra*, and *Meyer v. Townshend*, 3 B. 443; *Stewart v. Jones*, 3 De G. & J. 532; perhaps *Baker v. Hanbury*, 3 Russ. 340.

It is clear that a gift to A. or his executors for the benefit of his estate after a life interest, or where the payment is postponed, will fail by the death of A. before the testator: *Bone v. Cook*, M'Clel. 168, 13 Pr. 332; *Corbyn v. French*, 4 Ves. 418; *Tidwell v. Ariel*, 3 Mad. 403, where heirs was read as executors and administrators. *Leach v. Leach*, 35 B. 185.

This rule, however, does not apply where the gift is to A. or his heirs after a life interest, where heirs means next of kin, who take beneficially and not as mere representatives. *In re Porter's Trusts*, 4 K. & J. 188.

But it would seem a direct gift to A. or his executors, if executors is construed in its literal sense, would not lapse by A.'s death before the testator. See *Maxwell v. Maxwell*, 1. R. 2 Eq. 478; see, however, *Aspinall v. Duckworth*, 35 B. 307, and *ante*, p. 178.

If there is a gift to A. charged with a sum payable to B., the legacy to B. does not lapse by the death of A. before the testator. *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Oke v. Heath*, 1 Ves. sen. 134.

But the legacy would fail if the gift to A. is adeemed or revoked. *Couper v. Mantell*, 22 B. 223.

Now, by section 32 of the Wills Act, a devise of an estate tail will not lapse if there are at the death of the testator any issue inheritable under the entail.

And, by section 33, a gift of real or personal property to a child, or other issue of the testator, will not lapse if any issue of the devisee or legatee survive the testator.

The issue surviving the testator need not be living

the death of the devisee or legatee. *In the goods of rker*, 1 Sw. & Tr. 523.

In such a case the property bequeathed belongs to a legatee as if he had survived the testator, and passes his will. *Johnson v. Johnson*, 3 Ha. 157; *In the goods Parker*, 1 Sw. & Tr. 523; *Re Mason's Will*, 34 B. 34.

Section 33 applies to gifts under general powers of appointment, though there is a gift over in default of appointment. *Eccles v. Cheyne*, 2 K. & J. 676.

It does not apply to special powers: *Griffiths v. Gale*, 12 Sim. 354; *Freeland v. Pearson*, L. R. 3 Eq. 658; nor to cases where before the Act there would have been no lapse, as, for instance, gifts to a class. *Olney v. Bates*, 3 Dr. 319; *Browne v. Hammond*, Johns. 210.

These sections apply to the interest of a person dying before the date of the will, but after the Act came into operation, but not to a person dying before the Act came into operation. *Winter v. Winter*, 5 Ha. 306; *Mower v. Orr*, 7 Ha. 473; *Wild v. Reynolds*, 5 Notes of Cases, 1.

In the case of gifts to a class as tenants in common, the shares of members of the class dying before the testator do not lapse but go to the other members of the class.

Doctrine of lapse in the case of gifts to a class.

And in the same way a gift to the children of A. as tenants in common, to be vested at twenty-one, is in effect a gift to the children who attain twenty-one. *Re Colley's Trust*, L. R. 1 Eq. 496.

A direction, that the shares of any members of the class who die before the testator leaving issue shall not lapse, will not have the effect of causing the shares of those who die before the testator without issue to lapse. *Aspinall v. Duckworth*, 35 B. 307.

It is immaterial that the class may be so determined as to be incapable of increase; as, for instance, if the class is "my nephew and nieces living at the time of my

Gift to a class incapable of increase.

husband's decease," as tenants in common. *Dimond v. Bostock*, 10 Ch. 358; *Lee v. Pain*, 4 Ha. 201, 250; *Leigh v. Leigh*, 605.

No person incapable at the testator's death of taking is a member of the class.

And no person incapacitated from taking at the death of the testator is looked upon as a member of the class, so that, for instance, the share of a member of the class incapacitated from taking because he witnessed the will, goes to the other members. *Young v. Davies*, 2 Dr. & Sm. 167; *Fell v. Biddulph*, L. R. 10 C. P. 701. See, however, *Jull v. Jacobs*, 24 W. R. 947.

Revocation of the share of a member of the class.

When there is a gift to a class the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class. *Shaw v. MacMahon*, 4 D. & War. 431.

Revocation of share given to an individual.

Where there is a gift of residue to several individuals, as tenants in common, the revocation of the gift of any share causes a lapse, whether the revocation be of the share or of the trusts of the will, so far as they relate to the share. *Cresswell v. Cheslyn*, 2 Ed. 123; *Humble v. Shore*, 7 Ha. 247, 1 H. & M. 550 n.; *Lightfoot v. Burstall*, 1 H. & M. 546; *Re Wood's Will*, 29 B. 236; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129; *Sykes v. Sykes*, 4 Eq. 200, 3 Ch. 301.

A direction that a share which is revoked or lapses is to form part of the residue only carries it back to the same legatee as before and will not prevent lapse. *Re Bevis's Trust*, 20 W. R. 359.

But where a sum is given to several persons, and afterwards another person is directed to share, and this latter gift is revoked, the original gift remains. *Harris Davis*, 1 Coll. 416.

And a gift of residue to several persons, and to A. if living, does not lapse as to A.'s share if he is dead. *Re Hornby*, 7 W. R. 729; see *Sanders v. Ashford*, 28 B. 609.

A gift of aliquot shares to several named persons as tenants in common is not a gift to a class, and the shares of any dying before the testator lapse. *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129.

Gift of aliquot shares to named persons.

Nor is a gift to a class of persons "before mentioned," the persons having been previously named, a gift to a class. *Re Gibson*, 2 J. & H. 656.

But a gift to "my executors herein-named" has been held a gift to a class, the gift being attached to the office, and therefore passing wholly to those who survive to perform the office. *Knight v. Gould*, 2 M. & K. 295.

Whether a gift to named executors is subject to lapse.

But this is not the case if the gift, though the donees happen to be executors, is not given to them in respect of their office. *Barber v. Barber*, 3 M. & Cr. 688; *Hoare v. Osborne*, 12 W. R. 397.

The result is the same if the gift is to a class the members of which are then named. *Bain v. Lescher*, 11 Sim. 397.

And a gift to my wife's brother and sister and my brothers and sister equally, when the testator had at the date of the will three brothers and one sister, was held a *designatio personarum*, and the shares of two brothers who died before the testator lapsed. *Havergal v. Harrison*, 7 B. 49.

It is clear that a gift to A., and the children of B., may in effect be a gift to a class, if the testator treats the legatees as a class. *Re Stanhope's Trust*, 27 B. 201.

Gift to a class and a named individual.

And a direction to include an individual in the class does not make it the less a class, as in a gift equally to all my children, including W. *Shaw v. MacMahon*, 4 Dr. & War. 431.

On the other hand, a gift to surviving children and W., is not a gift to a class, and the share of W. will lapse

by his death before the testator. *Drakeford v. Drakeford*, 33 B. 43; *Re Chaplin's Will*, 12 W. R. 147; *Aspinall v. Duckworth*, 35 B. 307; *Re Clements*, 36 L. J. Ch. 171. See *Clark v. Philips*, 17 Jur. 886.

RESULTING TRUSTS.

Devise subject to a charge which fails.

Where an estate is devised subject to a charge, and the purpose for which the charge is created fails, the charge sinks for the benefit of the devisee. *A.-G. v. Milner*, 3 Atk. 112; *Jackson v. Hurlock*, Amb. 487, 2 Ed. 263; *King v. Denison*, 1 V. & B. 261; *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 J. & H. 449.

Where the devise is clearly subject to a charge it makes no difference that the money to be raised by the charge is given to purposes such as a charity, which, if valid, would in all events give it away from the devisee. *Baker v. Hall*, 12 Ves. 497; *Cooke v. Stationers' Company*, 3 M. & K. 262.

Whether the devisee takes subject to a charge, or only what remains after satisfying the charge.

Direction to pay a certain sum.

Direction to raise a sum which is disposed of in all events.

But where there is no express charge it must depend upon the general intention whether the particular gift is a charge, or whether the devisee was intended to take only what remains after deducting the particular gift.

1. Thus if the lands are not expressly charged, but the devisee is directed to pay a certain sum, there has been held to be a resulting trust. *Arnold v. Chapman*, 1 Ves. sen. 108; *Bland v. Wilkins*, cit. 1 B. C. C. 61.

2. If a sum is directed to be raised, and a full disposition is made of it, for instance, to a charity, in such a way that the disposition, if valid, must in all events give the money away from the devisee of the land, who is to take only from and after the raising the money, there is a resulting trust for the heir upon failure of the particular disposition. *Tregonwell v. Sydenham*, 3 Dow. 194.

But, if the money to be raised is given for purposes which, though valid, may not take effect, the mere fact that the land is not given till after raising the money will not take the money from the devisee if those purposes fail. *In re Cooper's Trusts*, 23 L. J. Ch. 25, 4 D. M. & G. 757.

And where land was devised for life and in tail after the expiration, or other sooner determination, of a term of ninety-nine years, limited to trustees, of which no trusts were declared, actual enjoyment by the devisee being intended, the devises were held to be subject to the term. *Sidney v. Shelley*, 19 Ves. 352.

Where a testator has by a previous instrument a power to charge real estates, and exercises the power by will, the above rules have no application. In such a case, if the disposition made by the will fails, the charge is nevertheless raisable. *Simmons v. Pitt*, 8 Ch. 978.

Distinction between a charge created by the will and by a prior instrument.

Upon the same principle, where there is a devise *subject* to trusts, the devisee takes the whole if those trusts fail, whereas a devise *upon* trusts which fail is undisposed of. *Clarke v. Hilton*, L. R. 2 Eq. 810; *Fenton v. Hawkins*, 9 W. R. 300; *Briggs v. Penny*, 3 Mac. & G. 546.

Devise *subject* to and *upon* trusts.

When certain property is excepted out of a devise for a particular purpose which fails, the devise of the whole holds good. *Evans v. Jones*, 2 Coll. 516; *Tatham v. Vernon*, 29 B. 604; see *Thompson v. Whitlock*, 1 De G. & J. 490; *Bernard v. Minshull*, Johns. 276.

Exception of property out of a devise.

But if the object of the exception is not merely to make the particular gift, but to prevent the property excepted from going on the same trusts as the whole, if, for instance, the property is excepted to save it from a charge of debts to which the rest is subject, it does not go on failure of the particular bequest to those taking that out of which it is excepted. *Wainman v. Field*, Kay, 507.

ACCELERATION.

Acceleration by lapse ;

Where there is a gift to A. for life, and after his death to B., if A. is incapable of taking because he is an attesting witness, or from any other cause, or if he refuses to take, the remainder is accelerated. *Jull v. Jacobs*, 24 W. R. 947.

by revocation or forfeiture.

The same is the case if the life estate is revoked by the testator, or determined by a forfeiture clause. *Lainson v. Lainson*, 18 B. 1, 5 D. M. & G. 754; *Eavestaff v. Austin*, 19 B. 591; *Craven v. Brady*, 4 Eq. 209.

Distinction between powers of sale and powers of charging.

In the same way, powers of sale will be accelerated, but not powers to charge. *Truell v. Tysson*, 21 B. 437.

Whether there is any distinction as regards acceleration between appointments and devises.

There is no distinction as regards acceleration between appointments and devises: *Craven v. Brady*, *supra*; though if the object of an appointment which is void is to benefit the persons who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated. *Crozier v. Crozier*, 3 D. & War. 353.

But where a remainder is limited after a contingent interest, there is an intestacy until it is ascertained whether the contingent interest will take effect or not. *Wade Gery v. Handley*, 1 Ch. D. 653; *Andrew v. Andrew*, 1 Ch. D. 410; see *D'Eyncourt v. Gregory*, 34 B. 36.

WHO ARE ENTITLED TO INTERESTS UNDISPOSED OF.

Interests undisposed of in realty and personalty pass to the heir-at-law or next of kin, as the case may be.

Whether a gift in satisfaction of all claims excludes a

Where there is a gift to a person in satisfaction of all claims on the testator's estate, he is not prevented from sharing as one of the next of kin in property which the testator has ineffectually attempted to dispose of. *Picker-*

ing v. Lord Stamford, 2 Ves. jun. 272, 581, 3 Ves. 332, 492. person from taking as next of kin.

But if no disposition of the residue is attempted to be made by the will, the person taking a legacy in satisfaction of all claims is not entitled to come in as next of kin. In the former case the person excluded is excluded for the purpose only of making the disposition attempted by the will; in the latter case he must be held to be excluded in favour of the other next of kin. *Breton v. Vachell*, 5 B. P. C. 51, 1 P. Wms. 548, 11 Vin. Ab. 185; *Lett v. Randall*, 3 Sm. & G. 83.

The point is, however, a doubtful one. *Tavernor v. Grindley*, 32 L. T. N. S. 424.

A direction that a person is to take no share in the estate of a testator will not prevent him from taking as next of kin. *Johnson v. Johnson*, 4 B. 318; *Sykes v. Sykes*, 4 Eq. 200, 3 Ch. 301; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129; see *Gould v. Gould*, 32 B. 391. Effect of a direction that one of the next of kin is to take no share of the testator's estate.

When land is devised to a trustee upon trusts which fail, and there is no heir, the trustee is beneficially entitled, though the land may be devised on trust for sale. *Walker v. Denne*, 2 Ves. jun. 170; *Taylor v. Haygarth*, 14 Sim. 8. The trustee takes when there is no heir.

On the other hand, in the case of chattels real and personal the Crown, and not the trustee, is entitled on failure of next of kin. *Cradock v. Owen*, 2 Sm. & G. 241; *Powell v. Merritt*, 1 Ib. 381; *Read v. Stedman*, 26 B. 495; *Johnstone v. Hamilton*, 11 Jur. N. S. 777. The Crown takes in default of next of kin.

RESIDUE UNDISPOSED OF.

Since Lord St. Leonards' Act, 11 Geo. 4 and 1 W. 4 c. 40, which controls the wills of testators dying after Sept. 1, 1830, the executors take the residue undisposed Effect of Lord St. Leonards' Act.

of for the benefit of the next of kin, unless a contrary intention is expressed in the will, parol evidence not being admissible. *Juler v. Juler*, 29 B. 34; *Love v. Gaze*, 8 B. 472.

Contrary
intention
within the
Act.

Such contrary intention does not sufficiently appear by the mere fact that the testator shows that he conceived himself to have disposed of the residue. *Travers v. Travers*, 14 Eq. 275.

But if the testator appoints three of his children executors without expressly giving them any beneficial interest, and gives reasons why he has not provided by his will for his other children, the executors will take the residue beneficially. *Harrison v. Harrison*, 2 H. & M. 237.

The Act
only ap-
plies where
the will
contains
no gift of
the resi-
due.

The Act applies only where the executor would otherwise have taken the undisposed residue; it does not therefore apply where there is an express devise of the residue, whether on trusts which do not exhaust the whole or otherwise. *Saltmarsh v. Barrett*, 29 B. 474, 3 D. F. & J. 279; *Neo v. Neo*, L. R. 6 P. C. 381; *Williams v. Arkle*, L. R. 7 H. L. 606.

Where
there are
no next of
kin the Act
does not
apply.

If, however, there are no next of kin, Lord St. Leonards' Act does not apply, and the executors will take the undisposed residue, unless a contrary intention is indicated, in which case it will go to the Crown. *Middleton v. Spicer*, 1 B. C. C. 201; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Taylor v. Haygarth*, 14 Sim. 8.

The title
of exe-
cutors in
cases under
the old
law.

It becomes, therefore, necessary to consider in what cases executors would have been held excluded from the residue undisposed of under the old law.

They do
not take
lapsed or
void lega-
cies.

1. They take only such residue as the testator did not intend to dispose of.

a. They do not take legacies which have lapsed: *Bennett v. Batchelor*, 3 B. C. C. 28; or are void. *A.-G. v. Tomkins*, Ambl. 216.

b. Nor do they take where the whole is expressly given to them on trusts which are void : *Dacre v. Patrickson*, 1 Dr. & Sm. 182 ; *Johnston v. Hamilton*, 11 Jur. N. S. 777 ; or not exhaustive : *Dawson v. Clark*, 18 Ves. 247 ; *Mapp v. Elcock*, 2 Ph. 793, 3 H. L. 492 ; or not declared. *Milnes v. Slater*, 8 Ves. 295 ; *Taylor v. Haygarth*, 14 Sim. 8 ; *Cradock v. Owen*, 2 Sm. & G. 241 ; *Read v. Steadman*, 26 B. 495 ; *Vezev v. Jamson*, 1 S. & St. 69 ; *Chester v. Chester*, 12 Eq. 444.

Nor residue given on trust.

The fact, however, that the executors are made trustees for some particular and limited purpose does not affect their title to the residue. *Batteley v. Windle*, 2 B. C. C. 31 ; *Griffiths v. Hamilton*, 12 Ves. 299 ; *Pratt v. Sladden*, 14 Ves. 193.

2. And even when the property is not given to the executors upon trust, if they are appointed to carry out the will : *Androvin v. Poilblanc*, 3 Atk. 299 ; *Braddon v. Farrand*, 4 Russ. 87 ; or are treated as undertaking a duty and not receiving a benefit : *Giraud v. Hanbury*, 3 Mer. 150 ; *Lord North v. Purdon*, 2 Ves. sen. 495 ; they take as trustees.

Executors not entitled to the residue when they are treated as trustees.

But where the trust is only inferential, evidence in favour of the executors will be admitted. *Gladding v. Yapp*, 5 Mad. 56.

3. And a presumption against the executor's title is raised if the testator shews an intention to dispose of the residue, though he may not actually do so : *Bishop of Cloyne v. Young*, 2 Ves. sen. 91 ; *North v. Purdon*, 2 Ves. sen. 495 ; *Davers v. Dewes*, 3 P. Wms. 40 ; *Mordaunt v. Hussey*, 4 Ves. 117 ; *Mence v. Mence*, 18 Ves. 348 ; or if he expresses an intention to dispose of part only of his property by his will : *Urquhart v. King*, 7 Ves. 225 ; or if the property is directed to go according to law. *Cranley v. Hale*, 14 Ves. 307.

Cases where the testator has not intended to dispose of all his property by his will.

In such cases evidence in support of the executor's title

is admissible. *Bishop of Cloyne v. Young*, 2 Ves. sen. 91; *Nourse v. Finch*, 1 Ves. jun. 844, 2 Ves. jun. 78.

4. The executor takes as trustee for the next of kin :

A legacy to a sole executor converts him into a trustee.

a. If there is a legacy to a sole executor, whether general or specific, or whether in possession or reversion, or whether expressed to be for his trouble or not, or whether for life or not, if there is no gift of the remainder. *Nourse v. Finch*, 1 Ves. jun. 843, 2 Ves. jun. 78; *Southcot v. Watson*, 3 Atk. 226; *Seley v. Wood*, 10 Ves. 71; *Oldman v. Slater*, 3 Sim. 84; *Rachfield v. Careless*, 2 P. Wms. 156; *King v. Denison*, 1 V. & B. 260; *Zouch v. Lambert*, 4 Bro. C. C. 326; *Dick v. Lambert*, 4 Ves. 725.

It makes no difference that the executrix is the testator's wife or relation, or that legacies are given to the next of kin. *Randall v. Bookey*, 2 Vern. 425; *Dick v. Lambert*, 4 Ves. 725; *Farrington v. Knightley*, 1 P. Wms. 543; and see note, *ib.*

If the legacy is given in general words parol evidence is admissible in support of the executor's title. *Clennell v. Lewthwaite*, 2 Ves. jun. 465, 644; *Langham v. Sanford*, 17 Ves. 435.

But not if it is given to him expressly for his trouble. *Rachfield v. Careless*, 2 P. Wms. 158.

What legacies will not convert an executor into a trustee.

It seems doubtful whether a contingent reversionary interest would raise a presumption against the executor's title. *Lynn v. Beaver*, T. & R. 63.

A legacy to an executor's wife will not convert him into a trustee for the next of kin. *Wilson v. Ivat*, 2 Ves. sen. 166; *Fruer v. Bouquet*, 21 B. 33.

In these cases the presumption against the executor's title arises from the difficulty of supposing that the testator would have given him something if he meant him to have all. Therefore, if the express legacy can be accounted for on other grounds, no presumption arises.

If, for instance, the legacy is an exception out of a larger gift: *Griffith v. Rogers*, 1 Eq. Ab. 245, pl. 8; *Jones v. Westcomb*, Prec. Ch. 316; and this includes the case of a gift to the executor for life, if there is a gift of the remainder: *Granville v. Beaufort*, 1 P. Wms. 114; or if the legacy is to an executrix, a married woman, for her separate use. *Newstead v. Johnson*, 2 Atk. 45, 9 Mod. 242.

b. Equal legacies to several executors will also raise a presumption against their title to the residue. *Ommaney v. Butcher*, T. & R. 260.

Equal legacies to several executors.

And this presumption, it seems, is not rebutted by the fact that unequal bounty is shown them as regards real estate. *Mackleston v. Brown*, 6 Ves. 52, p. 64.

But legacies to some executors and not to others, or unequal legacies to all, raise no presumption against them, since the intention may be to favour some more than others. *Griffiths v. Hamilton*, 12 Ves. 299; *Pratt v. Sladden*, 14 Ves. 193; *Bowker v. Hunter*, 1 B. C. C. 328; *Rawlings v. Jennings*, 13 Ves. 39; *Dawson v. Thorne*, 3 Russ. 235.

Legacies to some executors and not to others.

If, however, a legacy be given to one of several executors expressly for his trouble they all take as trustees. *White v. Evans*, 4 Ves. 21; *Milnes v. Slater*, 8 Ves. 295.

Legacy to one of several executors for his trouble.

But in such a case parol evidence to support their title would be admitted. *Williams v. Jones*, 10 Ves. 77.

5. If it is clear that the executors are appointed not from personal motives, but merely from convenience, or because they occupy a particular position, they take as trustees. *Urquhart v. King*, 7 Ves. 224; *De Mazay v. Pybus*, 4 Ves. 644; *Sadler v. Turner*, 8 Ves. 616.

Executors appointed for particular reasons.

Evidence in favour of next of kin is not admissible, except to rebut evidence in favour of the executors. *White v. Williams*, 3 V. & B. 72.

CHAPTER XXXIX.

ADMINISTRATION.

THE ORDER OF ASSETS.

THE order in which the assets of a testator are applied in administration is as follows :—

I. General
personal
estate.

I. the general personal estate. *Manning v. Spooner*, 3 Ves. 117.

1. And as to this, if a specific fund of personalty is charged, it is primarily liable if the residue is disposed of. *Browne v. Groombridge*, 4 Mad. 495 ; *Choat v. Yeates*, 1 J. & W. 102 ; *Evans v. Evans*, 17 Sim. 106 ; *Phillipps v. Eastwood*, 1 Ll. & G. 294 ; *Webb v. De Beauvoisin*, 31 B. 573.

Residue
undisposed
of.

2. If, however, the residue is undisposed of, the latter is primarily liable. *Holford v. Wood*, 4 Ves. 78 ; *Hewett v. Snare*, 1 De G. & S. 333 ; *Newbegin v. Bell*, 23 B. 386 ; *Corbet v. Corbet*, 1 R. 8 Eq. 407.

3. And generally it would seem that where there is no residuary gift, but there is in fact a residue of which no disposition has been attempted, this is in all cases the primary fund for payment of debts. *Howse v. Chapman*, 4 Ves. 542 ; *Taylor v. Mogg*, 27 L. J. Ch. 816.

Legacy
given in
lieu of a
share of
residue is
payable out

Legacies, however, even if given in lieu of a share of residue, the gift of which is revoked, and thereby becomes undisposed of, are not payable out of the share undisposed of, but out of the general estate. *Sykes v. Sykes*,

4 Eq. 200, 3 Ch. 301; see *Cresswell v. Cheslyn*, 2 Ed. 123, 3 B. P. C. 246; see 1 Sw. 571 n.

of the
general
personal
estate.

But the testator may direct it to be paid out of the revoked share of residue. *In re Wood's Will*, 29 B. 236; *Walsh v. Walsh*, I. R. 4 Eq. 396.

5. On the question whether a lapsed share of residue is applicable in payment of debts in priority to a share effectually disposed of:—

Whether a
lapsed
share of
residue is
applicable
before a
share well
disposed of.

a. It appears to be clear that if there is a general charge of debts, a lapsed share only contributes rateably. *Eyre v. Marsden*, 4 M. & Cr. 231; *Burt v. Sturt*, 10 Ha. 415; *Oddie v. Brown*, 4 De G. & J. 179; see *Elborne v. Goode*, 14 Sim. 165.

b. Further, if a mixed residue of pure and impure personalty is given to a charity, so that the gift fails as regards the impure personalty, the latter will not be the primary fund as against the other portion, the gift of which takes effect, but debts will be payable rateably out of both. *A.-G. v. Lord Winchelsea*, 3 B. C. C. 373; S. C. nom. *A.-G. v. Hurst*, 2 Cox, 364.

It is not, however, quite clear whether there was a general charge of debts in this case or not.

c. But if there is no charge of debts it seems not clearly settled whether a lapsed share is primarily applicable to payment of debts.

If there is
no general
charge of
debts.

It is laid down by Lord Cottenham in *Eyre v. Marsden*, 4 M. & Cr. 231, that a residue is what remains after payment of debts, and therefore, a share of residue being only ascertainable after debts are paid, a lapsed share ought to bear no more than a proportionate part of the debts. Lord Cottenham's remarks were evidently intended to apply equally whether there is an express charge of debts or not. See *Greenwood v. Jemmett*, 26 B. 479.

However, there can be no doubt that to throw the debts

upon a lapsed share of residue would effect the testator's intention, and perhaps it would be now so decided in accordance with the opinion of Vice-Chancellor Malins in *Gowan v. Broughton*, 19 Eq. 77. There seem to be no authorities precisely in point. *Chatteris v. Young*, cited Beames on Costs, 390, and *Skrymster v. Northcote*, 1 Sw. 571, only decide that the costs of ascertaining the title to a lapsed share of residue are to be borne by that share, and are, so far, no doubt authorities to the contrary, since the decision would have been unnecessary if a lapsed share of residue were primarily applicable as a matter of course. See, too, *Sykes v. Sykes*, 3 Ch. 301.

II. Real estate devised for payment of debts.

II. Real estate devised or ordered to be sold for payment of debts, whether it descends to the heir or not. *West v. Lawday*, 1 R. 2 Eq. 517; *Phillips v. Parry*, 22 B. 279; *Stead v. Hardaker*, 15 Eq. 174.

III. Real estate descended not charged with debts.

III. Real estate descended not charged with debts whether it descends, because no disposition has been attempted: *Davies v. Topp*, 1 B. C. C. 527; *Harmood v. Oglander*, 8 Ves. 125; *Manning v. Spooner*, 3 Ves. 117; or by reason of lapse. *Scott v. Cumberland*, 18 Eq. 578. This case, however, stands in a peculiar position, as the question there was not as to debts, but as to costs of an administration suit, and so far as it lays down that costs of an administration suit, in no way incurred on behalf of the heir, are to be borne by descended estates in priority to personal estate effectually disposed of, it seems to be very doubtful. See 8 Ch. 345.

IV. Real estate charged with debts and devised or descended.

IV. Real estate charged with payment of debts and devised or descended rateably. *Wood v. Ordish*, 3 Sm. & G. 125; *Peacock v. Peacock*, 13 W. R. 516, 34 L. J. Ch. 315; *Ryves v. Ryves*, 11 Eq. 539; *Stead v. Hardaker*, 15 Eq. 175; see, however, *Williams v. Chitty*, 3 Ves. 545.

V. General legacies.

V. General pecuniary legacies rateably. *Collins v.*

Lewis, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Flower*, 3 Ch. D. 109; see *Hensman v. Fryer*, 3 Ch. 420.

1. As between general legacies the further question may arise if there is no residuary gift, whether a lapsed pecuniary legacy exonerates those that take effect:—

Whether lapsed legacy is applicable before those effectually given.

a. Where all the legacies are subject to a charge of debts, a lapsed pecuniary legacy only contributes rateably. *Howse v. Chapman*, 4 Ves. 542.

b. Where there is no charge of debts it would seem on the principle of *Gowan v. Broughton*, 19 Eq. 77, and *Scott v. Cumberland*, 18 Eq. 578, that a lapsed legacy is primarily applicable, and see *In re Ham's Trusts*, 2 Sim. N. S. 106.

2. As to what are general legacies for the purpose of abatement:—

What are general legacies for purposes of abatement.

Legacy duty directed to be paid on a specific legacy is a general legacy, and abates with them. *Farrar v. St. Catherine's Coll.* 16 Eq. 19; see *Wilson v. O'Leary*, 17 Eq. 419.

And annuities for the purpose of abatement rank with general legacies. *Miller v. Huddleston*, 1 Mac. & G. 513.

In estimating the value of annuities for purposes of abatement their value is to be taken at the time when the estimate is made; thus the value of the annuity of an annuitant who is dead, is the sum of the payments which would have been made to him in respect of it, and the value of a reversionary annuity which has come into possession is its present value at the time of abatement, plus any arrears due upon it. *Todd v. Bielby*, 27 B. 353; *Potts v. Smith*, 8 Eq. 683.

How the value of annuities is to be calculated.

3. Priority of general legacies, *inter se*:

a. As between general legatees, legacies given for valuable consideration, as for debts, or instead of dower, have priority. *Blower v. Morrett*, 2 Ves. sen. 420; *Heath v.*

Legacies for valuable consideration have priority.

Dendy, 1 Russ. 548 ; *Norcott v. Gordon*, 14 Sim. 258 ; *Bell v. Bell*, 6 Ir. Eq. 239 ; *Daries v. Bush*, 1 You. 341 ; *Stahlschmidt v. Lett*, 1 Sm. & G. 421.

A legacy, however, in lieu of dower, where the testator has no land out of which the widow is dowable, has no priority. *Acey v. Simpson*, 5 B. 35 ; *Roper v. Roper*, 24 W. R. 1013.

A legacy to an executor for his trouble has no priority. *Duncan v. Watts*, 16 B. 204.

Time of
payment
creates no
priority.

b. Legacies payable at the death of a tenant for life, or at some other future period, do not abate before other legacies. *Miller v. Huddleston*, 3 Mac. & G. 513 ; *Street v. Street*, 2 N. R. 56 ; *Nickisson v. Cockill*, 3 D. J. & S. 622,

Legacies
intro-
duced by
"firstly,"
"second-
ly."

The words "in the first place," "in the next place," or the word "afterwards," used in introducing legacies, create no priority between them. *Thwaites v. Forman*, 1 Coll. 409 ; *Beeston v. Booth*, 4 Mad. 161 ; *Whitehouse v. Insole*, 7 L. T. N. S. 400.

Legacies
given on
supposition
of a sur-
plus.

c. But legacies given on the supposition that there will be more than enough to pay prior legacies abate first. *A.-G. v. Robins*, 2 P. Wms. 23 ; *Stammers v. Halliley*, 12 Sim. 42.

Legacies for
life appli-
cable on the
death of
the lega-
tees.

And a direction that certain legacies given for life are to become applicable on the death of the legatees to the payment of other legacies will give the legatees for life priority. *Brown v. Brown*, 1 Kee. 275 ; see *Haynes v. Haynes*, 3 D. M. & G. 590.

Real estate
subject to
annuities
made appli-
cable in aid
of person-
alty.

And where real estate given, subject to certain annuities, is made applicable in aid of the personalty to the payment of legacies subject to those annuities, the annuities have priority over the legacies. *Earl of Portarlington v. Damer*, 4 D. J. & S. 161 ; see *Coore v. Todd*, 7 D. M. & G. 520.

And, of course, when a particular legacy is given, and

the residue is then distributed in certain sums, the particular legacy has priority over all the others. *Gyett v. Williams*, 2 J. & H. 429.

4. Priority between general and residuary legatees :

a. As a general rule the residuary legatee is entitled to nothing till all the particular legacies given by the will are satisfied in full.

General legacies have priority over residue.

Thus, a gift of the rest of a specific fund after payment of debts and funeral expenses, where legacies have been given as well, is a gift of the residue after payment of the legacies as well as the debts and funeral expenses. *Foxen v. Foxen*, 3 N. R. 452, 13 W. R. 33.

In the same way, where a fund is set apart to pay annuities, and is directed upon the death of the annuitants respectively to fall into the residue, if the fund is insufficient to pay the annuities, the residuary legatee is entitled to nothing till all the legacies and annuities have been paid in full. *Arnold v. Arnold*, 2 M. & K. 374; *Anderson v. Anderson*, 33 B. 223; *In re Lyne's Estate*, 8 Eq. 482; *In re Tootal's Estate*, 2 Ch. D. 628.

Fund set apart to pay annuities.

b. On the other hand, if the annuitants are directed to abate in the event of the fund proving insufficient, or they are contemplated as taking only the income of the fund, whatever it may be, the residuary legatee takes the fund released upon the death of any of the annuitants. *Farmer v. Mills*, 4 Russ. 86; *Scott v. Salmond*, 1 M. & K. 363.

Direction that annuitants are to abate.

c. Upon similar principles, where assets have been lost after the death of the testator, the loss falls on the residuary legatee in the first instance. *Wilmot v. Jenkins*, 1 B. 401; *Baker v. Farmer*, L. R. 3 Ch. 537. *Dyose v. Dyose*, 1 P. Wms. 305, is overruled, see *Fonereau v. Poyntz*, 1 B. C. C. 478; *Humphreys v. Humphreys*, 2 Cox, 186; *Baker v. Farmer*, supra.

Loss of assets falls on the residue.

On the other hand, if the legatees assent to an appropriation of a particular sum in payment of their legacies,

Assent by legatees to appropriation.

they are only entitled to the sum so appropriated, and must abate if that sum proves insufficient, whether through loss of assets or otherwise. *Ex parte Chadwin*, 3 Sw. 380.

VI. Real estate devised not charged with debts and specific gifts.

VI. Real estate devised, not charged with debts, including residuary real estate, and specifically bequeathed personal estate rateably. *Hensman v. Fryer*, 3 Ch. 420, (see *Lancefield v. Iggulden*, 10 Ch. 136); *Jackson v. Pease*, 19 Eq. 96.

Real estate devised subject to a legacy would, it seems, be applicable before the legacy to which it is subject. *Raikes v. Boulton*, 29 B. 41.

VII. Property appointed.

VII. Property appointed by the will under a power of appointing, whether by deed or will, or by will only. *Fleming v. Buchanan*, 3 D. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & G. 305; *Petre v. Petre*, 14 B. 197; *Williams v. Lomas*, 16 B. 1; see *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 572.

VIII. Land is governed by the *lex loci*.

VIII. Land in a foreign country is governed by the *lex loci rei sitæ*, and is only liable to such debts as would be cast upon it by the law of that country. *Harrison v. Harrison*, 8 Ch. 342.

COSTS OF ADMINISTRATION.

Costs of administration are not debts.

It appears to be clear that the costs of an administration suit are not debts within the meaning of a charge of debts created by the testator. *Stringer v. Harper*, 26 B. 585; and that the order of liability of assets for their payment is not the same as in the case of debts.

They are payable out of the personalty.

They are payable primarily out of the personal estate. *Ripley v. Moysey*, 1 Kee. 578; *Pickford v. Brown*, 2 K. & J. 426; *Jackson v. Pease*, 19 Eq. 96.

How far descended estates are liable.

But as regards descended estates, it would seem that so far as the costs are not incurred with reference to the

descended estates, the latter are only liable rateably with estates effectually devised. *Maddison v. Pye*, 32 B. 658; see *Harrison v. Harrison*, 8 Ch. 342, p. 345; and see *Scott v. Cumberland*, 18 Eq. 579.

If, however, the legal estate in the descended estates is in the trustees of the will, the descended estates will be applicable before devised estates. *Row v. Row*, 7 Eq. 414.

MARSHALLING.

I. General rules.

Where a fund has been applied out of its proper order in the administration of assets, the persons who would have been entitled to the fund may claim for the amount so applied against the fund, which ought to have been applied in priority to their own. See *Tombs v. Roch*, 2 Coll. 490.

A fund applied out of its order is entitled to be recouped.

Thus, legatees may stand against descended realty, or against realty charged with debts, if the personalty has been exhausted in payment of debts. *Foster v. Cook*, 3 B. C. C. 347; *Paterson v. Scott*, 1 D. M. & G. 531; *Rickard v. Barrett*, 3 K. & J. 289.

Marshalling between legatees and the heir or devisees charged with debts.

So, too, a general pecuniary legatee is entitled to stand against the mortgaged land, in the place of a mortgagee who has exhausted the personal estate in payment of the mortgage. *Forrester v. Leigh*, Amb. 172; *Wythe v. Heniker*, 2 M. & K. 635; *Binns v. Nichols*, L. R. 2 Eq. 256.

Between legatees and devisees of mortgaged lands.

Pecuniary legatees are, however, not entitled to have the assets marshalled against residuary devisees, where the land is not charged with debts. *Hensman v. Fryer*, 8 Ch. 420; *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234.

Between legatees and residuary devisees!

Upon similar principles it has been held that legatees are entitled to stand in the place of the vendor against an

Between legatees and devisees subject to a

lien for the purchase money.

estate purchased by the testator, and paid for after his death out of the general personal estate. This is clear where the estate has descended. *Sproule v. Prior*, 8 Sim. 189.

And it has been so held where the estate is devised. *Birds v. Askey*, 24 B. 618; *Lord Lilford v. Powys Keck*, L. R. 1 Eq. 347. *Wythe v. Henniker*, 2 M. & K. 635 is contra; see *Barnwell v. Iremonger*, 1 Dr. & S. 255.

Between legatees with and without a charge on realty.

So, too, the principle of marshalling applies between legatees, some of whose legacies are charged upon realty and others not. *Hanby v. Roberts*, Ambl. 127, 2 Coll. 512, Dick. 104.

But this is not the case if the claim against one of the funds fails; if, for instance, where the legacy is charged on land, the legatee dies before the time of payment. *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

Of course persons whose fund has been applied in its proper order have no right to stand in the place of a creditor against a fund not applicable till after their own. *Douglas v. Cooksey*, 1 R. 2 Eq. 311.

II. Marshalling in the case of charities :

Assets not marshalled in favour of charities.

When pure and impure personalty are given to charity, the Court will not marshal the assets so as to cast the debts on the impure personalty, unless an intention can be gathered from the will that the assets are to be marshalled. *Gaskin v. Rogers*, L. R. 2 Eq. 284; *Wigg v. Nicholl*, 14 Eq. 92.

In the absence of such an intention the charitable legacies will abate in the proportion of the pure to the impure personalty.

Direction that charities are to be paid out of pure personalty.

A direction that the charities are to be paid out of pure personalty will give them priority over other legatees as regards the pure personalty, but will not release the pure personalty from bearing its proportion of the debts. *Robinson v. Geldard*, 3 De G. & Sm. 499, 3 Mac. & G.

735; *Tempest v. Tempest*, 2 K. & J. 635, 7 D. M. & G. 470; *Beaumont v. Oliveira*, 6 Eq. 534, 4 Ch. 309; see, however, *Nickisson v. Cockill*, 3 D. J. & S. 622.

But a gift of residue to charity with a direction that the residue so given is to consist of pure personalty, following a provision for payment of debts out of realty and out of residuary personalty only so far as the realty will not extend, throws the debts on the impure personalty in default of realty. *Wills v. Bourne*, 16 Eq. 487.

Direction that residue given to charity is to consist of pure personalty.

The same is the effect of a direction to reserve the pure personalty for charities. *Miles v. Harrison*, 9 Ch. 316.

CHARGE OF DEBTS.

I. What debts it includes :

A direction to pay debts includes all the legal debts of the testator subsisting at his death, but not debts barred by statute. *Burke v. Jones*, 2 V. & B. 275; *Maxwell v. Maxwell*, L. R. 4 H. L. 506.

Charge of debts includes debts subsisting at the death.

It will also include damages accrued after the testator's death on an equitable liability to indemnify, and damages recovered in respect of a covenant broken after the testator's death. *Willson v. Leonard*, 3 B. 373; *Morse v. Tucker*, 5 Ha. 79.

Damages accrued after the death.

And though there may be words limiting the debts to a particular class of debts, as of debts due at a particular period of the testator's life, the Court will lean to the wider construction, so as to include all the debts. *Bridgman v. Dove*, 2 Atk. 201; *Dormay v. Borradaile*, 10 B. 263; *Birmingham v. Burke*, 2 J. & Lat. 699.

Debts due at a particular time.

A direction to pay the debts of another person includes the debts subsisting at his death, but not debts barred by statute. *O'Connor v. Haslam*, 5 H. L. 170.

Direction to pay debts of another.

But a direction to deduct from the share of a legatee the debts due from him to other legatees will include debts barred by statute, where the testator's intention is,

Direction to deduct debts due from a legatee.

that the debts in question should be treated as if they were advances made by himself. *Poole v. Poole*, 7 Ch. 17.

So where a share of residue is given to a person, and a debt due from him is directed to be deducted, the whole debt, and not merely what can legally be recovered is to be deducted. *Matthews v. Keble*, 4 Eq. 467, 3 Ch. 691.

Testamen-
tary ex-
penses.

A general direction to pay testamentary expenses will, *prima facie*, include the costs of an administration suit. *Morrell v. Fisher*, 4 De G. & Sm. 422; *Miles v. Harrison*, 9 Ch. 316; *Harloe v. Harloe*, 20 Eq. 471.

But where a testatrix declared her intention to be to give the residue of her estate free of all deductions in respect of probate duty, or on any other account, and directed all the legatees named in her will to contribute rateably to her funeral and testamentary expenses, the costs of an administration suit were held not included under testamentary expenses. *Re Biel's Estate*, 16 Eq. 577.

Funeral
and other
expenses.

And under "funeral and other expenses," or "legal expenses," the costs of an administration suit are included. *Webb v. De Beauvoisin*, 31 B. 573; *Coventry v. Coventry*, 2 Dr. & Sm. 470.

Debts and
costs of
proving
will.

But the words "debts and costs of proving the will" do not include costs of an administration suit. *Stringer v. Harper*, 26 B. 585; see *Alsop v. Bell*, 24 B. 451.

Apparently *Browne v. Groombridge*, 4 Mad. 495, and *Gilbertson v. Gilbertson*, 34 B. 354, where the costs of a special case were held not included in testamentary expenses are against the current of authority.

II. Upon what property a charge of debts and legacies attaches :

Charge of
debts and
legacies ex-
tends to
specific
devisees.

A charge of debts and legacies on all the property of the testator charges them on specifically devised real estate. *Maskell v. Farrington*, 3 D. J. & S. 338; *Mannox v. Greener*, 14 Eq. 456; see *Earl of Portarlington v. Damer*, 4 D. J. & S. 161.

But a general charge of legacies merely will not be extended to lands specifically devised, but will be confined to residuary lands. *Spong v. Spong*, 1 Y. & J. 300; 3 Bl. N. S. 84, 1 D. & Cl. 365; *Conron v. Conron*, 7 H. L. 168; *Wheeler v. Claydon*, 16 B. 169.

Charge of legacies only is confined to residuary lands.

It seems indifferent whether the lands specifically given are expressly subject to certain other charges or not. *Ib.*

III. How a charge of debts is created :

It seems a gift of a rent charge without more would effect a charge on all the testator's lands. *Ex parte McDowall*, 5 Jur. N. S. 553.

Devise of a rent charge.

A charge of debts upon realty "in case the personal estate should be insufficient for their payment," is in effect a general charge of debts, as the additional words only express what would be implied without them. *Greetham v. Colton*, 34 B. 615.

Charge on realty in case the personalty should be insufficient.

1. General direction to pay debts :

It is now clearly settled that a general direction to pay debts charges them upon real estate devised by the will. *Clifford v. Lewis*, 6 Mad. 33; *Ball v. Harris*, 8 Sim. 485, 4 M. & Cr. 264; *Shaw v. Borrer*, 1 Kee. 559; *Harding v. Grady*, 1 D. & War. 480; *Elliot v. Montgomery*, 1 R. 7 Eq. 214.

General direction to pay debts charges realty.

Whether real estate would be charged by such a direction where the will only attempts to dispose of personalty seems doubtful. The remarks of Sir R. P. Arden, in *Shallcross v. Finden*, 3 Ves. 739, probably only contemplate a case of lapse.

Whether realty left to descend would be charged.

A subsequent express charge of particular debts upon certain estates, or upon all the real estate, will not overrule the general direction. *Taylor v. Taylor*, 6 Sim. 246; *Forster v. Thompson*, 4 D. & War. 303 (*Douce v. Lady Torrington*, 2 M. & K. 600, is overruled).

Subsequent express charge of certain debts on particular estates.

Nor will a subsequent express charge of all the debts

Subsequent charge of

all debts on
personalty.

upon the personalty. *Price v. North*, 1 Ph. 85; *Graves v. Graves*, 8 Sim. 43; *Hartland v. Murrell*, 27 B. 204.

Subsequent
charge of
all debts
upon por-
tions of the
realty.

But a subsequent express charge of all the debts upon particular portions of the realty would, it seems, overrule the general direction. *Palmer v. Graves*, 1 Kee. 545. This distinction reconciles the case with those previously cited; but *quære*, whether it is substantial.

Exception
of certain
real estate
out of a
subsequent
charge.

So, too, if certain real estate is expressly excepted out of a subsequent charge of debts upon a portion of the realty, the general direction is controlled. *Thomas v. Britnell*, 2 Ves. sen. 313.

Express
charge not
controlled
by partial
charges.

Of course an express charge of debts on real and personal estate is not controlled by subsequent partial charges. *Wrigley v. Sykes*, 21 B. 337.

2. Direction to executors to pay debts :

Direction
to execu-
tors to pay
debts will
not charge
realty
where no
land is
devised to
them.

a. Again, if the executor is directed to pay the debts, they are not charged upon the real estate unless real estate is expressly devised to him. *Keeling v. Brown*, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209; *Cook v. Dawson*, 29 B. 123, 3 D. F. & J. 127.

A direction to an executor to pay debts, followed by a devise to another person introduced by the word "then," will not charge the land. *Brydges v. Landen*, 3 Russ. 346 n., 3 Ves. 550; *Willan v. Lancaster*, 3 Russ. 108.

But if the real estate is devised "subject as aforesaid," it is charged. *Dowling v. Hudson*, 17 B. 248.

Land de-
vised to the
executors is
charged.

b. And if land is devised to the executors, whether in trust or not, it is charged with debts. *Barker v. Duke of Devonshire*, 3 Mer. 310; *Henvell v. Whitaker*, 3 Russ. 343; *Dormay v. Borradaile*, 10 B. 263; *Hartland v. Murrell*, 27 B. 204; *Bentley v. Robinson*, 10 Ir. Ch. 293.

Whether
legacies to
be paid by
the execu-
tor are a

So legacies directed to be paid by the executor will be a charge on land specifically devised to him. *Allcock v. Sparhawk*, 2 Vern. 228; *Preston v. Preston*, 2 Jur. N.

S. 1040; *Gallimore v. Gill*, 2 Sm. & G. 158, 4 W. R. 773. The point is, however, not free from doubt: see *Parker v. Fearnley*, 2 S. & St. 592; *Cross v. Kennington*, 9 B. 150, 10 Jur. 343, 15 L. J. Ch. 167.

charge on land specifically devised to him.

It makes no difference apparently that the devise is of an estate tail or of an estate tail for life. *Clowdsley v. Pelham*, 1 Vern. 411, 1 Eq. Ab. 198 pl. 2; *Harris v. Watkins*, Kay, 438; *Cook v. Dawson*, 29 B. 123; see *Finch v. Hattersley*, 3 Russ. 345 n.; *Doe d. Ashby v. Baines*, 2 C. M. & R. 23.

Where the devise is for life or in tail.

On the other hand, if land is devised only to one of several executors, or unequal interests are devised to them, the land is not charged. *Warren v. Davies*, 2 M. & K. 49; *Symons v. James*, 2 Y. & C. C. 301; *Wasse v. Helsington*, 3 M. & K. 495.

Devises to executors unequally.

A gift of real and personal estate after payment of debts charges both. *Withers v. Kennedy*, 2 M. & K. 607; *Moore v. Whittle*, 22 L. J. Ch. 207.

Gift of real and personal estate after payment of debts.

3. Charge upon income or corpus :

It would seem that a power to raise money out of the rents and profits would naturally mean out of the annual rents and profits, but the cases show that a power to raise a lump sum out of rents and profits will authorise a sale. See *Bootle v. Blundell*, 1 Mer. 233, *per* Lord Eldon; *Baines v. Dixon*, 1 Ves. sen. 42.

Power to raise out of rents and profits to pay debts or legacies.

This is clear at any rate where the object is to pay debts or legacies. *Lingon v. Foley*, 2 Ch. Ca. 205, *Anon.* 1 Vern. 104; *Berry v. Askham*, 2 Vern. 26; *Metcalfe v. Hutchinson*, 1 Ch. D. 591. *Lord Londesborough v. Somerville*, 19 B. 295.

Or, if the money is to be raised within a given time, and the annual rents would be insufficient to raise the money within that time. *Sheldon v. Dormer*, 2 Vern. 310; *Warburton v. Warburton*, Ib., 420; *Gibson v. Lord Montfort*, 1 Ves. sen. 491.

Money payable within a given time.

Portions.

Portions, it would seem, are on the same footing as debts, as it is to be presumed that they are to be paid within a limited time. *Trafford v. Ashton*, 1 P. Wms. 415; *Stanhope v. Thacker*, Prec. Ch. 435.

Gross sum payable at once.

Similarly, if a gross sum payable out of rents and profits is payable at once, it may be raised by sale. *Allan v. Backhouse*, 2 V. & B. 65, Jac. 631.

When the annual rents only are applicable.

But if the testator treats the rents and profits as applicable for some time for the purpose of raising the money, and gives the whole lands from and after raising the money, the power will be limited to the annual rents and profits. *Small v. Wing*, 5 B. P. C. 68; see *Harper v. Munday*, 7 D. M. & G. 369; *Heneage v. Lord Andover*, 3 Y. & J. 360; *Lord Lovat v. Duchess of Leeds*, 10 W. R. 398.

Power to mortgage includes power of sale.

A power to mortgage will authorise a mortgage with a power of sale. *In re Chawner's Will*, 8 Eq. 569.

Fines for renewing leaseholds given in succession.

In the case of fines for renewal of leaseholds given for life with remainders, the Court will, as a rule, apportion the fine between tenant for life and remainderman, according to their enjoyment, though it may be directed to be raised out of the "rents and profits, or by mortgage." *Greenwood v. Evans*, 4 B. 44; *Jones v. Jones*, 5 Ha. 440; *Reeves v. Creswick*, 3 Y. & C. Ex. 715, Lewin on Trusts, p. 323; *Ainslie v. Harcourt*, 28 B. 313.

But if the fine is to be paid out of the "annual rents," it must be borne entirely by the tenant for life. *Solley v. Wood*, 29 B. 482.

Whether annuities are payable out of income or corpus.
Express charge on corpus.

It is often a question of some difficulty whether an annuity is payable out of the corpus or only out of the income of a fund set aside for its payment.

a. If the annuity is plainly charged upon the corpus it is of course liable to make good arrears. *Picard v. Mitchell*, 14 B. 103; *Howarth v. Rothwell*, 30 B. 516; *Stamper v. Pickering*, 9 Sim. 176; *Wroughton v. Colqu-*

houn, 1 De G. & Sm. 36, 357; *Hickman v. Upsall*, 2 Giff. 124; *Gordon v. Bowden*, 6 Mad. 342; *Swallow v. Swallow*, 1 B. 432, n.; *Torre v. Browne*, 5 H. L. 555; *Haynes v. Haynes*, 3 D. M. & G. 590; *Lazonby v. Rawson*, 4 D. M. & G. 556; *Upton v. Vanner*, 1 Dr. & Sm. 594; *Horton v. Hall*, 17 Eq. 437; *Pearson v. Helliwell*, 18 Eq. 411.

b. And if there is a clear gift of an annuity, a direction to set a fund apart to secure it which is to fall into the residue upon the death of the annuitant, does not disentitle the annuitant to have arrears made up out of corpus, since the direction is merely a means to the end. The question is then merely between the annuitant and the residuary legatee. *Bright v. Larcher*, 3 De G. & J. 148; *Davies v. Wattier*, 1 S. & St. 463; *May v. Bennett*, 1 Russ. 370; *Miner v. Baldwin*, 1 Sm. & G. 522; *Wright v. Callender*, 2 D. M. & G. 652; *Croly v. Weld*, 3 D. M. & G. 993; *Ingleman v. Worthington*, 1 Jur. N. S. 1062; *Mills v. Drewitt*, 20 B. 632; *Perkins v. Cooke*, 2 J. & H. 393; *Anderson v. Anderson*, 33 B. 223.

Direction to set apart a fund which is to fall into the residue.

It makes no difference that the fund if directed to fall into the residue after the death of the annuitant may go to persons other than the residuary legatees. *Wright v. Callender*, *supra*.

In these cases the direction to set apart a fund, in fact amounts to a charge upon the corpus.

c. But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remainderman. *A.-G. v. Poulden*, 3 Ha. 555; *Baker v. Baker*, 6 H. L. 616; *Hindle v. Taylor*, 20 B. 109; *Miller v. Huddleston*, 17 Sim. 71, 3 Mac. & G. 513; *Michell v. Wilton*, 23 W. R. 789.

Direction to set apart a fund to pay an annuity out of the dividends with gift over.

d. When, however, the annuity is charged upon the

Annuity charged

upon income of whole estate.

income of the whole estate there is more difficulty. If the capital is given over, "subject to" or "after payment" of the annuities the corpus is liable. *Phillips v. Gutteridge*, 11 W.R. 12, 8 Jur. N. S. 1196, 32 L. J. Ch. 1, 4 De G. & J. 531; *Stamper v. Pickering*, 8 Sim. 176; *Playfair v. Cooper*, 17 B. 187; *Ex parte Wilkinson*, 3 De G. & S. 633; *Perkins v. Cooke*, 2 J. & H. 393; *Re Tyndall*, 7 Ir. Ch. 181; *Percy v. Percy*, 35 B. 295; *Carter v. Salt*, 1 R. 1 Eq. 97; *Bell v. Bell*, 1 R. 6 Eq. 239; *Birch v. Sherratt*, 4 Eq. 58, 2 Ch. 644.

Corpus treated as remaining entire at the annuitant's death.

e. But if there is anything to show that the corpus is looked upon as entire after the annuitant's death; if, for instance, it is given over immediately upon the death of the annuitant, or the trust then comes to an end, or it is then directed to be sold, or if the corpus is devised in strict settlement, it is not liable to make good arrears. *Foster v. Smith*, 1 Ph. 629; *Addecott v. Addecott*, 29 B. 460; *Re Kelly*, 9 Ir. Ch. 103; *Forbes v. Richardson*, 11 Ha. 354; *Tarbottom v. Earle*, 11 W. R. 680; *Darbon v. Rickards*, 14 Sim. 537; *Earle v. Bellingham* (No. 1), 24 B. 445; *Sheppard v. Sheppard*, 32 B. 194; *Taylor v. Taylor*, 17 Eq. 324.

Gift of surplus income of each year.

And if it is clear that the annuity is to be paid only out of the income of each year, by a gift, for instance, of the surplus income of each year as it accrues, to others, the corpus is *à fortiori* not liable. *Stelfox v. Sugden*, Johns. 234; *Darbon v. Rickards*, 14 Sim. 537; *Sheppard v. Sheppard*, 32 B. 194.

When an annuity is a continuing charge on the annual rents.

f. In some cases the further question arises whether, supposing the annuity not to be charged upon corpus, it is a continuing charge on the rents and profits, so that arrears will have to be made up out of surplus income during the annuitant's life, and even after his death; and if there is nothing to show that the annuity was to be confined to the income of each year, as in *Stelfox v.*

Sugden, or that it was to determine immediately on the annuitant's death, as in *Foster v. Smith*, 1 Ph. 629 ; *Earle v. Bellingham*, 24 B. 445, arrears will be a continuing charge during the annuitant's life and after his death. *Forbes v. Richardson*, 11 Ha. 354 ; *Phillips v. Phillips*, 8 B. 193 ; *Phillips v. Gutteridge*, 3 D. J. & S. 332 ; *Taylor v. Taylor*, 17 Eq. 324 ; *Booth v. Coulton*, 5 Ch. 684 ; *Salvin v. Weston*, 14 W. R. 757.

EXONERATION OF PERSONALTY.

I. By express words :—

The personal estate is the primary fund for payment of debts, but it may be exonerated by express words. *Morrow v. Bush*, 1 Cox, 185 ; *Young v. Young*, 26 B. 522 ; *Dawes v. Scott*, 5 Russ. 32 ; *Forrest v. Prescott*, 10 Eq. 545.

Exonera-
tion by ex-
press
words.

A direction not to pay debts out of a specific fund of personalty is effectual without a gift over of the fund, though the fund may not be specifically disposed of, but falls into the residue. *Coventry v. Coventry*, 2 Dr. & S. 470.

Gift over
of the fund
is not
necessary.

When the personalty is given exonerated from debts, it is not applicable to their payment till everything else is exhausted. *Morrow v. Bush*, 1 Cox, 185 ; *Young v. Young*, 26 B. 522.

On the other hand, if land is given in exoneration of the personalty, the personalty is primarily liable if the land so given is insufficient. *Colvile v. Middleton*, 3 B. 570.

Similarly as between land and residue, both given exempt from debts, the residue is primarily liable on failure of other funds. *Lord Brooke v. Earl of Warwick*, 1 H. & T. 142.

And personalty disposed of exempt from debts is ex-

Whether
personalty

exonerated
is exonerated
in
favour of
next of kin.

empted only for the purposes of that disposition, and not in favour of next of kin. *Waring v. Ward*, 5 Ves. 676; *Dacre v. Patrickson*, 1 Dr. & S. 186.

If, however, it is exempted from debts, and no disposition is made, it is exempted for all purposes. *Milnes v. Slater*, 8 Ves. 305. 1 Dr. & S. 186. See *Noel v. Noel*, 12 Pr. 214.

II. Exoneration on the general context :—

1. In the absence of express words exonerating the personalty from the payment of debts it is primarily liable, though other funds may be provided.

What will
not exonerate
the
personalty.

Thus, neither a charge of debts on the realty, or on a specific portion, nor a devise upon trust for sale for payment of debts, will exonerate the personalty. *White v. White*, 2 Vern. 43; *Walker v. Hardwick*, 1 M. & K. 396; *Ouseley v. Anstruther*, 10 B. 453; *Quennell v. Turner*, 13 B. 240; *Hancox v. Abbey*, 11 Ves. 186; *Collis v. Robins*, 1 De G. & S. 131.

Devise on
condition
of paying
debts.

2. Whether a devise upon condition of paying the testator's debts will exonerate the personalty seems doubtful. The better opinion seems to be that it will not. *Bridgman v. Dove*, 3 Atk. 201; *Meade v. Hide*, 2 Vern. 120, and *Welby v. Rockcliffe*, 1 R. & M. 571; *Henry v. Henry*, 1 R. 6 Eq. 286.

Gift of a
sum in ex-
oneration
of a mort-
gage di-
rected to
be paid by
devisee.

But in a case not within Locke King's Act a devise of mortgaged lands to A., he paying the mortgage, with a subsequent gift of a sum in exoneration of the mortgage, entitles the devisee to that sum and no more. *Lockhart v. Hardy*, 9 B. 379.

Express
charge of
certain
debts on
personalty.

3. An express charge of certain debts upon the personalty does not exonerate it from its primary liability to the other debts. *Brydges v. Phillips*, 6 Ves. 567; *Watson v. Brickwood*, 9 Ves. 447.

Gift of
realty and
personalty

4. A gift of realty and personalty together on trust to pay debts will not exonerate the personalty from being

primarily liable. *Boughton v. Boughton*, 1 H. L. 406; *Tench v. Cheese*, 6 D. M. & G. 453.

together on
trust to
pay debts.

5. But if the realty is given upon trust for sale, and blended with the personalty upon trust to pay debts, the realty and personalty are liable rateably. *Roberts v. Walker*, 1 R. & M. 752; *Stocker v. Harbin*, 3 B. 479; *Salt v. Chattaway*, 3 B. 576; *Dunk v. Fenner*, 2 R. & M. 557; *Fourdrin v. Gowdey*, 3 M. & K. 383; *Tatlock v. Jenkins*, Kay, 654; *Bedford v. Bedford*, 35 B. 584.

Gift on
trust to
sell and
pay debts.

And where real and personal estate are given together, with a discretionary power to trustees to sell as often as they should think fit, legacies directed to be paid out of the real and personal estate are payable *pro rata*. *Allan v. Gott*, 7 Ch. 439.

Discretion
to trustees
to sell
realty.

So, too, if realty is directed to be converted and become part of the personal estate. *Bright v. Larcher*, 3 De G. & J. 148; *Simmons v. Rose*, 6 D. M. & G. 411.

Realty to
be sold and
form part
of personal
estate.

6. When debts are directed to be paid, and there is a gift of the residue of the real and personal estate together, the legacies and debts are charged upon the mixed fund rateably. *Greville v. Browne*, 7 H. L. 689.

Gift of re-
sidue of
real and
personal
estate.

It is immaterial whether interests in land have been already given by the will or not. *Bench v. Biles*, 4 Mad. 187; *Francis v. Clemow*, Kay, 435; *Wheeler v. Howell*, 3 K. & J. 198.

A direction to executors to pay debts and legacies, the residuary realty and personalty being devised to other persons, will not alter the case. *Re Brooke's Estate*, 24 W. R. 957.

But the rule does not apply where the gift is not of the "residue" of the real and personal estate. *Symons v. James*, 2 Y. & C. C. 301.

The gift
must be of
residue.

And where the whole personal estate is disposed of in certain proportions, the sums so given out of the per-

sonalty will not be charged on the realty by the residuary gift. *Gyett v. Williams*, 2 J. & H. 429.

When the gift of residue is specific.

And the rule does not apply if the gift, though in form residuary, is really specific. *Castle v. Gillett*, 16 Eq. 530; *Thorman v. Hilhouse*, 7 W. R. 332, 5 Jur. N. S. 563.

Charge of funeral and testamentary expenses on realty.

7. A charge of debts, funeral and testamentary expenses on the realty, which latter it can hardly be supposed the personalty would be insufficient to meet, will nevertheless not exonerate the personalty. *Walker v. Jackson*, 2 Atk. 624; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; see *Coote v. Coote*, 3 J. & Lat. 175.

Personal estate specifically given.

But where the whole personal estate is given, not as a residue, but specifically, and the realty is subject to all the charges to which the personalty would be liable, the personalty is exonerated; if, for instance, all the personalty is given, and the realty is charged with debts, funeral expenses, and costs of administration. *Greene v. Greene*, 4 Mad. 148; *Michell v. Michell*, 5 Mad. 69; *Blount v. Hipkins*, 7 Sim. 43; *Gilbertson v. Gilbertson*, 34 B. 354.

Legacies charged on land where the personalty is specifically given.

The same rule applies with regard to legacies where the whole personalty is given, and legacies are charged upon land. *Jones v. Bruce*, 11 Sim. 221; *Lance v. Aglionby*, 27 B. 65.

And where the personalty is specifically given, and a particular estate is devised upon trust to pay debts funeral and testamentary expenses, upon failure of that estate, the general personalty and the realty are liable *pro ratâ* to make up the deficiency. *Powell v. Riley*, 12 Eq. 175.

Specific gift of personalty to an executor.

The fact, however, that the gift of all the personalty is to a person appointed executor is a strong argument against the exoneration of the personalty. *Brummel v.*

Prothero, 3 Ves. 111; *Aldridge v. Lord Wallscourt*, 1 Ba. & Be. 312.

And when it is doubtful whether the whole personal estate is meant to be given specifically, or only as a residue, the fact that funeral and testamentary expenses are not charged on the realty, as well as the debts, is an argument against exoneration. *Collis v. Robins*, 1 De G. & S. 131; *Ouseley v. Anstruther*, 10 B. 453; *Bootle v. Blundell*, 1 Mer. 193, 19 Ves. 494; see *Tower v. Lord Rous*, 18 Ves. 138.

8. There is no rule to the effect that a charge of particular debts upon realty makes the realty the primary fund for those debts. *Quennell v. Turner*, 13 B. 240; *Noel v. Lord Henley*, 7 Pr. 241, Dan. 211; see *Bickham v. Cruttwell*, 3 M. & Cr. 763.

Effect of charge of particular debts on realty.

The cases of *Hancox v. Abbey*, 11 Ves. 179, and *Evans v. Cockeram*, 1 Coll. 428, only establish, that where a debt is already a charge upon realty, a devise of lands, including the mortgaged land in trust for sale and payment of the mortgaged debt, or a declaration that the mortgage is to be charged upon the land, must mean that it is to be a primary charge on the land, otherwise, as it is already a charge upon realty, the words would have no meaning.

Hancox v. Abbey and *Evans v. Cockeram*.

Hancox v. Abbey, however, probably comes better under another head, see pp. 474, 478.

Welby v. Rockcliffe, 1 R. & M. 571, was decided on the ground that the testator had imposed the condition of paying his debts upon the devisee; and in *Clutterbuck v. Clutterbuck*, 1 M. & K. 15, there was a gift of the residue of the real and personal estate not therein-before otherwise disposed of, showing that the only land given was after payment of the sum directed to be raised to pay debts.

The cases where legacies given out of a particular fund

Distinction between

cases of ex-
oneration
and specific
gifts of in-
terests in
land.

have been held payable out of that fund are also distinguishable. The question in those cases has generally been, not whether the personalty was only secondarily liable, but whether it was liable at all; in other words, whether the legacy was demonstrative or specific. See, for instance, *Dickin v. Edwards*, 4 Ha. 273; *Bessant v. Noble*, 26 L. J. Ch. 236; *Fream v. Dowling*, 20 B. 624, 4 Eq. 145 n.

Gift of
lands after
payment of
debts.

9. Where, however, a sum is directed to be raised out of land for payment of debts, and the land is not given till after such payment, or only the residue of the land is given, there is a strong argument that the land was to be the primary fund. *Hancox v. Abbey*, 11 Ves. 179; *Hale v. Cox*, 3 B. C. C. 322; see *Clutterbuck v. Clutterbuck*, 1 M. & K. 15; *Noel v. Noel*, 12 Pr. 214; Lord St. Leonards's Law of Property, 363, 365; *Ion v. Ashton*, 28 B. 379.

TENANT FOR LIFE AND REMAINDERMAN.

I. Capital and income.

Dividends
on shares.

1. As between tenant for life and remainderman, dividends declared before the death of the tenant for life, though not paid till afterwards, belong to his representatives. *Wright v. Tuckett*, 1 J. & H. 266.

Dividends on shares in a company declared after the death of the tenant for life, though earned before his death, go to the remainderman. *Mackinley v. Bates*, 31 B. 280.

Partner-
ship
profits.

On the other hand partnership profits declared for a past period are the income of that period. *Ibbotson v. Elam*, L. R. 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586.

Debts.

Debts are the profits of the period when they are got in. *Maclaren v. Stainton*, 3 D. F. & J. 202; *Edmondson v. Crosthwaite*, 34 B. 30.

A fund created for the protection of property given for life is capital. *Varlo v. Faden*, 1 D. F. & J. 211.

2. When there is a power vested in a duly-constituted authority of declaring whether profits shall be added to capital or distributed, the tenant for life is bound by the authority. *Straker v. Wilson*, 6 Ch. 503; *In re Ezekiel Bartom's Trust*, 5 Eq. 238; *Baring v. Ashburton*, 16 W. R. 452.

Power of declaring whether profits are to be capital or income.

3. With regard to bonuses, it seems clear that bonuses declared out of capital are capital. *Paris v. Paris*, 10 Ves. 185; *Watts v. Steere*, 13 Ves. 363; *Brander v. Brander*, 14 Ves. 80.

Bonuses out of capital.

On the other hand, bonuses declared out of profits, whether accumulated profits or not, are income. *Barclay v. Wainwright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 Sim. 163; *Plumbe v. Neild*, 8 W. R. 837, 29 L. J. Ch. 618; *Dale v. Hayes*, 19 W. R. 299; *In re Hopkins' Trust*, 18 Eq. 696; see *Hollis v. Allan*, 14 W. R. 980.

Bonuses out of profits.

But, perhaps, the case would be different if it could be shown that the payment being out of accumulated profits, such profits were entirely earned before the testator's death. See *Dale v. Hayes*, *supra*.

4. A tenant for life impeachable for waste cannot cut timber at all.

Right of tenant for life to the produce of real estate.

a. In the case of a timber estate, however, the tenant for life is entitled to the proceeds of the periodical cuttings. *Bateman v. Hotchkin*, 31 B. 486; *Bagot v. Bagot*, 32 B. 509, 517.

b. And even where the estate is not a timber estate the tenant for life is entitled to the rightful cuttings of all trees which are not timber, or ornamental or useful to the estate. *Pidgely v. Rawling*, 2 Coll. 275; *Earl Cowley v. Wellesley*, 35 B. 638, S. C., L. R. 1 Eq. 656, see 18 Eq. 307; *Honywood v. Honnywood*, 18 Eq. 306.

Timber cuttings.

Timber cut
by the
Court.

c. When timber trees are cut down by order of the Court to improve other trees, or because they are decaying, the tenant for life is entitled to the income of the proceeds. *Tooker v. Annesley*, 5 Sim. 235; *Tollemache v. Tollemache*, 1 Ha. 456; *Ferrand v. Wilson*, 4 Ha. 381; *Earl Cowley v. Wellesley*, L. R. 1 Eq. 657; *Honywood v. Honnywood*, 18 Eq. 806.

Timber
blown
down.

The tenant for life is not entitled to anything in respect of timber trees proper, whether blown down or cut; the proceeds of such trees vest in the first owner of an estate of inheritance, or in the first tenant for life unimpeachable for waste. *Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263; *Seagram v. Knight*, L. R. 2 Ch. 128; *Honywood v. Honnywood*, 18 Eq. 806.

II. Residue given to persons in succession.

What is
residue as
between
tenant for
life and
remainder-
man.

As between tenant for life and remainderman, residue is what remains after taking such portion of the capital as, together with the income of such portion for one year, whatever that income may be, is required to pay the testator's debts and legacies. *Allhusen v. Whittell*, 4 Eq. 294; *Lambert v. Lambert*, 16 Eq. 320; *Marshall v. Crowther*, 2 Ch. D. 199.

Property
properly
invested.

1. The tenant for life is entitled to the income of so much of the property as is invested on authorized securities from the testator's death. *Brown v. Gellatly*, L. R. 2 Ch. 751.

Unauthor-
ized secu-
rities.

2. With regard to unauthorized securities, the tenant for life is entitled from the testator's death, to the income which would be produced by the money upon unauthorized security, if invested on authorized security at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Ha. 161; *Brown v. Gellatly*, L. R. 2 Ch. 751.

Property
which
cannot be
converted.

3. With regard to such property as cannot be converted within the year, the tenant for life is entitled from

the testator's death to interest at 4 per cent. upon the then value of such property. *Meyer v. Simonsen*, 5 De G. & S. 723; *Brown v. Gellatly*, L. R. 2 Ch. 751; see *Arnold v. Enis*, 2 Ir. Ch. 601.

4. Where personalty is directed to be laid out in land the tenant for life is entitled to the income from the testator's death. *Macpherson v. Macpherson*, 1 Macq. 243.

Personalty
to be laid
out in
land.

Where accumulation is directed till investment, one year is allowed. *Sitwell v. Barnard*, 6 Ves. 520.

5. Reversionary property must be sold under trusts for conversion, and if the testator gives his trustees a discretion as to the period of conversion, interest will be allowed upon the value of the reversion at the end of a year from the death. *Wilkinson v. Duncan*, 23 B. 469; *Johnson v. Routh*, 3 Jur. N. S. 1041, 27 L. J. Ch. 305; *Countess of Harrington v. Atherton*, 3 D. J. & S. 352.

Reversion-
ary pro-
perty must
be sold.

And if the reversion falls in before it is sold the tenant for life is entitled to interest upon the value of the reversion at the end of a year from the testator's death, on the assumption that it was to fall in when it actually did fall in. *Wilkinson v. Duncan*, 23 B. 469.

6. The tenant for life is entitled to the income of a fund set apart to pay contingent legacies. *Crawley v. Crawley*, 7 Sim. 427; *Fullerton v. Martin*, 1 Dr. & Sm. 81; *Crawley v. Dixon*, 23 B. 513; *Allhusen v. Whittell*, 4 Eq. 295.

Income of
fund to
pay con-
tingent
legacies
goes to
tenant for
life.

7. With regard to assets recovered after the testator's death the tenant for life is entitled to the difference between the sum recovered, and the sum which, if invested at 4 per cent. at the testator's death, would have amounted to the sum recovered. *Cox v. Cox*, 8 Eq. 343; *Ackroyd v. Ackroyd*, 18 Eq. 813; *In re Tinkler's Estate*, 20 Eq. 456; see *Maclaren v. Stainton*, 4 Eq. 448, 11 Eq. 382.

Apportion-
ment of re-
covered
assets.

Leaseholds
converted
under com-
pulsory
powers.

8. When the tenant for life is entitled to the specific enjoyment of leaseholds which are converted under compulsory powers, he will be entitled to the same income as before, and if he survives the period when the lease would have determined, he is absolutely entitled to the purchase money. *Jeffreys v. Conner*, 28 B. 328; *In re Beaufoy's Estate*, 1 Sm. & G. 20; *In re Money's Trusts*, 2 Dr. & S. 94; see *Phillips v. Sargent*, 7 Ha. 33.

Title to
fund for
renew
where re-
newal has
become im-
possible.

9. In the case of renewable leaseholds where the testator has directed the creation of a fund for renewal out of the rents, and the power of renewal is subsequently destroyed, the remainderman will be entitled to the fund for renewal if the object of the testator was to keep the leaseholds perpetually renewed at any cost. *In re Wood's Estate*, 10 Eq. 572; *Hollier v. Burne*, 16 Eq. 163; *Maddy v. Hale*, 24 W. R. 1005.

10. On the other hand, if only a reasonable sum is to be applied in renewals, the tenant for life will be entitled to the whole fund. *Morris v. Hodges*, 27 B. 625; *In re Money's Trusts*, 2 Dr. & S. 94, 10 W. R. 399; see *Hayward v. Pile*, 5 Ch. 215.

Apportion-
ment of
costs of re-
newal.

11. When renewable leaseholds are given to several persons in succession without any direction as to how the cost of renewal is to be borne, the rules are :

a. If the tenant for life gets no advantage from the renewal, the sum to be paid by the remainderman is the sum actually paid with compound interest at 4 per cent. down to the death of the tenant for life, and simple interest afterwards. *Nightingale v. Lawson*, 1 B. C. C. 440; *White v. White*, 9 Ves. 557; *Giddings v. Giddings*, 3 Russ. 260.

b. If the tenant for life lives to enjoy the benefit of the renewal, the remainderman has to pay a sum bearing the same proportion to the whole sum paid as the benefit he

gets from the renewal bears to the whole of the renewed lease, with interest as before ; cases *supra*.

c. In the case of renewable leaseholds for lives the same principles apply, the value of the lives being calculated at the time of the renewal according to the tables framed for the purpose ; the chance that the new life may fail during the subsistence of the other *cestuis que vie* being apparently thrown upon the remainderman. *Jones v. Jones*, 5 Ha. 440 ; *Harris v. Harris*, 32 B. 333 ; *Bradford v. Brownjohn*, 3 Ch. 711.

CHAPTER XL.

SUGGESTIONS FOR PREPARING WILLS.

THE possible dispositions of property by testators are so infinitely various that general suggestions can be of very little use. The following points have however been selected as likely to arise in the majority of cases.

1. With regard to payment of debts, if land is to be applied in exoneration of the personalty an express direction to that effect should be inserted.

2. The testator should consider whether mortgages are to be borne by the devisee or to be discharged out of the general personal estate. In the former case a declaration to that effect should be inserted if the property is leasehold, and, in the latter case, a corresponding declaration should be inserted if the property is freehold or copyhold.

3. In the case of bequests to charities not empowered to take land by devise, proper directions as to payment out of pure personalty should be inserted.

4. In the description of the subject-matter of the testator's bounty language generally intelligible should be used. Thus terms of art, symbols, terms derived from local custom and so on should be avoided.

5. Things should be described by their permanent and not by their changeable characteristics; for instance, description of land by occupation should be avoided.

6. In the case of specific bequests care should be taken to ascertain the exact title of the stock or other security which is the subject of the bequest, and the testator should be reminded of the liability of specific gifts to ademption by change of security or sale.

7. Inquiry should be made whether annuities given by the will are intended to be for the lives of the annuitants only or perpetual.

8. Residuary gifts should be expressed in the most general terms, and enumeration of particular things should be avoided.

9. When a residue is given to several persons in succession, the testator should consider whether the tenant for life is intended to enjoy the property in the state in which it may be found at the testator's death or whether it is to be converted.

10. In the description of persons the same general caution applies as in the description of things.

11. If the gift is to a husband and wife with others, care should be taken to secure that the wife should take a separate share.

12. In the case of gifts to several persons or to classes words of severance should be introduced unless a joint tenancy is intended.

13. If illegitimate children are to be provided for, the fact that illegitimate children are intended should be unmistakably expressed.

14. In the case of bequests to children, where it is possible that children may be born after the period of distribution has arrived, the testator should consider whether he wishes all the children to be included, and, in the latter event, clear words to that effect should be introduced.

15. In the case of gifts to several classes of persons or to different generations of issue, if the distribution is intended to be per stirpes there should be words to that effect.

16. It will as a rule be found advisable to avoid such vague terms as relations or family.

17. In gifts of personalty, words whether of purchase or limitation appropriate to realty should be avoided, and the same applies *mutatis mutandis* to devises.

18. In the case of gifts to a parent and children, or to a parent and issue, care should be taken to show whether the children or issue were intended to take concurrently with their parent or not.

19. The difficulties arising upon the rule in *Shelley's case* are too familiar to need comment.

20. The testator should be careful to distinguish between a recommendation and an obligation intended to be imposed on a legatee, and in cases where he merely desires to express a wish there should be an express declaration that no trust is intended.

21. Clear directions should be inserted with regard to vesting in cases where bequests are intended to be contingent upon the attainment of a given age, and care should be taken to bring clearly before the testator's mind the distinction between payment and vesting.

22. In the case of conditions imposed upon legatees there should be a gift over in the event of a clear and definite breach, and care must be taken that the breach should accurately correspond with the condition. Testators should, however, be warned that to impose any but the simplest conditions upon legatees is as a rule an invitation to litigation.

23. Care should be taken that the dispositions of the testator do not infringe the rule against perpetuity, and that there is no trust for accumulation beyond the limits allowed by statute.

24. In substitutional gifts to children inquiry should be made whether any persons satisfying the description of the members of the original class are dead at the date of the will leaving children, and provision should be made accordingly.

25. In survivorship clauses, it should be clearly indicated to what period survivorship is to be referred, and whether survivorship is contemplated between individuals or between stirpes.

APPENDIX.

1 VIC. CAP. XXVI.

AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS. [3D JULY, 1837.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the Words and Expressions hereinafter mentioned, which in their ordinary Signification have a more confined or a different Meaning, shall in this Act, except where the Nature of the Provision or the Context of the Act shall exclude such Construction, be interpreted as follows; (that is to say,) the Word "Will" shall extend to a Testament, and to a Codicil, and to an Appointment by Will or by Writing in the Nature of a Will in exercise of a Power, and also to a Disposition by Will and Testament or Devise of the Custody and Tuition of any Child, by virtue of an Act passed in the Twelfth Year of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of *Ireland* in the Fourteenth and Fifteenth Years of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service*, and to any other Testamentary Disposition; and the Words "Real Estate" shall extend to Manors, Advowsons, Messuages, Lands, Tithes, Rents, and Hereditaments, whether Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether corporeal, incorporeal, or personal, and to any undivided Share thereof, and to any Estate, Right, or Interest (other than a Chattel Interest) therein; and the Words "Personal Estate" shall extend to Leasehold Estates and other Chattels Real, and also to Monies, Shares of Government and other Funds, Securities for Money (not being Real Estates), Debts, Choses in Action, Rights, Credits, Goods, and all other Property whatsoever which by Law devolves upon the Executor or Administrator, and to any Share or Interest therein; and every Word importing the Singular Number only shall extend and be applied to several Persons or Things as well as One Person or Thing; and every Word importing the Masculine Gender only shall extend and be applied to a Female as well as a Male.

Meaning of
certain
words in
this Act:

"Will:"

12 Car. 2,
c. 24.

14 & 15 Car.
2 (I.).

"Real
Estate:"

"Personal
Estate:"

Number:

Gender.

Repeal of
the Statutes
of Wills, 32
Hen. 8, c. 1,
and 34 & 35
Hen. 8, c. 5.

10 Car. 1,
Sess. 2, c. 2,
(1.).

Secs. 5, 6,
12, 19, 20,
21, and 22 of
the Statute
of Frauds,
29 Car. 2,
c. 3; 7 Will.
3, c. 12 (1.).

Sec. 14 of
4 & 5 Anne,
c. 16.

6 Anne,
c. 10 (1.).

Sec. 9 of
14 Geo. 2,
c. 20.

25 Geo. 2,
c. 6 (except
as to Colo-
nies).

25 Geo. 2,
c. 11 (1.).

55 Geo. 3,
c. 192.

All Pro-
perty may
be disposed
of by Will,

II. And be it further enacted, That an Act passed in the Thirty-second Year of the Reign of King *Henry* the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land*; and also an Act passed in the Thirty-fourth and Thirty-fifth Years of the Reign of the said King *Henry* the Eighth, intituled *The Bill concerning the Explanation of Wills*; and also an Act passed in the Parliament of *Ireland*, in the Tenth Year of the Reign of King *Charles* the First, intituled *An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins*; and also so much of an Act passed in the Twenty-ninth Year of the Reign of King *Charles* the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of *Ireland* in the Seventh Year of the Reign of King *William* the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to Devises or Bequests of Lands or Tenements, or to the Revocation or Alteration of any Devise in Writing of any Lands, Tenements, or Hereditaments, or any Clause thereof, or to the Devise of any Estate *pur autre vie*, or to any such Estate being Assets, or to Nuncupative Wills, or to the repeal, altering, or changing of any Will in Writing concerning any Goods or Chattels or Personal Estate, or any Clause, Devise, or Bequest therein; and also so much of an Act passed in the Fourth and Fifth Years of the Reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of *Ireland* in the Sixth Year of the Reign of Queen *Anne*, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, as relates to Witnesses to Nuncupative Wills; and also so much of an Act passed in the Fourteenth Year of the Reign of King *George* the Second, intituled *An Act to Amend the Law concerning Common Recoveries, and to explain and amend an Act made in the Twenty-ninth Year of the Reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'* as relates to Estates *pur autre vie*; and also an Act passed in the Twenty-fifth Year of the Reign of King *George* the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*, except so far as relates to His Majesty's Colonies and Plantations in *America*; and also an Act passed in the Parliament of *Ireland* in the same Twenty-fifth Year of the Reign of King *George* the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates*; and also an Act passed in the Fifty-fifth Year of the Reign of King *George* the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any Wills or Estates *pur autre vie* to which this Act does not extend.

III. And be it further enacted, That it shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all Real Estate and all Personal Estate which he shall be entitled to, either at Law or in Equity, at the Time of his Death, and which, if not so devised, bequeathed, or disposed of would devolve upon the Heir at Law, or Customary Heir of him, or, if he became entitled by Descent, of his Ancestor, or upon his

Executor or Administrator ; and that the power hereby given shall extend to all Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, notwithstanding that the Testator may not have surrendered the same to the Use of his Will, or notwithstanding that, being entitled as Heir, Devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a Custom to devise or surrender to the Use of a Will or otherwise, could not at Law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a Custom that a Will or a Surrender to the Use of a Will should continue in force for a limited Time only, or any other special Custom, could not have been disposed of by Will according to the Power contained in this Act, if this Act had not been made : and also to Estates *pur autre vie*, whether there shall or shall not be any special Occupant thereof, and whether the same shall be Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether the same shall be a corporeal or an incorporeal Hereditament ; and also to all contingent, executory, or other future Interests in any Real or Personal Estate, whether the Testator may or may not be ascertained as the Person or one of the Persons in whom the same respectively may become vested, and whether he may be entitled thereto under the Instrument by which the same respectively were created or under any Disposition thereof by Deed or Will ; and also to all Rights of Entry for Conditions broken, and other Rights of Entry ; and also to such of the same Estates, Interests, and Rights respectively, and other Real and Personal Estate, as the Testator may be entitled to at the time of his Death, notwithstanding that he may become entitled to the same subsequently to the Execution of his Will.

IV. Provided always, and be it further enacted, That where any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, might, by the Custom of the Manor of which the same is holden, have been surrendered to the Use of a Will, and the Testator shall not have surrendered the same to the Use of his Will, no Person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon Payment of all such Stamp Duties, Fees, and Sums of Money as would have been lawfully due and payable in respect of the surrendering of such Real Estate to the Use of the Will, or in respect of presenting, registering, or enrolling such Surrender, if the same Real Estate had been surrendered to the Use of the Will of such Testator : Provided also, that where the Testator was entitled to have been admitted to such Real Estate, and might, if he had been admitted thereto, have surrendered the same to the Use of his Will, and shall not have been admitted thereto, no Person entitled or claiming to be entitled to such Real Estate in consequence of such Will shall be entitled to be admitted to the same Real Estate by virtue thereof, except on Payment of all such Stamp Duties, Fees, Fine, and Sums of Money as would have been lawfully due and payable in respect of the Admittance of such Testator to such Real Estate, and also of all such Stamp Duties, Fees, and Sums of Money as would have been lawfully due and payable in respect of surrendering such Real Estate to the Use of the Will, or of presenting, registering, or enrolling such Surrender, had the Testator been duly admitted to such Real Estate, and after-

comprising Customary Freeholds and Copyholds without Surrender, and before Admittance, and also such of them as cannot now be devised ;

Estates *pur autre vie* ;

contingent Interests ;

Rights of Entry ; and Property acquired after Execution of the Will.

As to the Fees and Fines payable by Devisees of Customary and Copyhold Estates.

wards surrendered the same to the Use of his Will; all which Stamp Duties, Fees, Fine, or Sums of Money due as aforesaid shall be paid in addition to the Stamp Duties, Fees, Fine, or Sums of Money due or payable on the Admittance of such Person so entitled or claiming to be entitled to the same Real Estate as aforesaid.

Wills or
Extracts of
Wills of
Customary
Freeholds
and Copy-
holds to be
entered on
the Court
Rolls ;

and the
Lord to be
entitled to
the same
Fine, &c.,
when such
Estates are
not now de-
visable as
he would
have been
from the
Heir in case
of Descent.

Estates pur
autre vie.

V. And be it further enacted, That when any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, shall be disposed of by Will, the Lord of the Manor or reputed Manor of which such Real Estate is holden, or his Steward, or the Deputy of such Steward, shall cause the Will by which such Disposition shall be made, or so much thereof as shall contain the Disposition of such Real Estate, to be entered on the Court Rolls of such Manor or reputed Manor ; and when any Trusts are declared by the Will of such Real Estate, it shall not be necessary to enter the Declaration of such Trusts, but it shall be sufficient to state in the Entry on the Court Rolls that such Real Estate is subject to the Trusts declared by such Will ; and when any such Real Estate could not have been disposed of by Will if this Act had not been made, the same Fine, Heriot, Dues, Duties, and Services shall be paid and rendered by the Devisee as would have been due from the Customary Heir in case of the Descent of the same Real Estate, and the Lord shall as against the Devisee of such Estate have the same Remedy for recovering and enforcing such Fine, Heriot, Dues, Duties, and Services as he is now entitled to for recovering and enforcing the same from or against the Customary Heir in case of a Descent.

VI. And be it further enacted, That if no Disposition by Will shall be made of any Estate *pur autre vie* of a Freehold Nature, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of special Occupancy, as Assets by Descent, as in the Case of Freehold Land in Fee Simple ; and in case there shall be no special Occupant of any Estate *pur autre vie*, whether Freehold or Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether a corporeal or incorporeal Hereditament, it shall go to the Executor or Administrator of the Party that had the Estate thereof by virtue of the Grant ; and if the same shall come to the Executor or Administrator either by reason of a special Occupancy or by virtue of this Act, it shall be Assets in his Hands, and shall go and be applied and distributed in the same Manner as the Personal Estate of the Testator or Intestate.

No Will of a
Person
under Age
valid ;

nor of a
Feme Co-
vert, except
such as
might now
be made.

Every Will
shall be in
Writing, and
signed by
the Testa-
tor in the
Presence of
Two Wit-
nesses at
one Time.

Appoint-
ments by

VII. And be it further enacted, That no Will made by any Person under the Age of Twenty-one Years shall be valid.

VIII. Provided also, and be it further enacted, That no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act.

IX. And be it further enacted, That no Will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned ; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction ; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

X. And be it further enacted, That no Appointment made by Will, in exercise of any Power, shall be valid, unless the same be executed

in manner herein-before required ; and every Will executed in manner herein-before required shall, so far as respects the Execution and Attestation thereof, be a valid Execution of a power of Appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such Power should be executed with some additional or other Form of Execution or Solemnity.

XI. Provided always, and be it further enacted, That any Soldier being in actual Military Service, or any Mariner or Seaman being at Sea, may dispose of his Personal Estate as he might have done before the making of this Act.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the Provisions contained in an Act passed in the Eleventh Year of the Reign of His Majesty King *George the Fourth* and the First Year of the Reign of His late Majesty King *William the Fourth*, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the Wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money, and Allowances, or other Monies payable in respect of Services in Her Majesty's Navy.

XIII. And be it further enacted, That every Will executed in manner herein-before required shall be valid without any other Publication thereof.

XIV. And be it further enacted, That if any Person who shall attest the Execution of a Will shall at the Time of the Execution thereof or at any Time afterwards be incompetent to be admitted a Witness to prove the Execution thereof, such Will shall not on that Account be invalid.

XV. And be it further enacted, That if any Person shall attest the Execution of any Will to whom or to whose Wife or Husband any beneficial Devise, Legacy, Estate, Interest, Gift, or Appointment, of or affecting any Real or Personal Estate (other than and except Charges and Directions for the Payment of any Debt or Debts), shall be thereby given or made, such Devise, Legacy, Estate, Interest, Gift, or Appointment shall, so far only as concerns such Person attesting the Execution of such Will, or the Wife or Husband of such Person, or any Person claiming under such Person or Wife or Husband, be utterly null and void, and such Person so attesting shall be admitted as a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof, notwithstanding such Devise, Legacy, Estate, Interest, Gift, or Appointment mentioned in such Will.

XVI. And be it further enacted, That in case by any Will any Real or Personal Estate shall be charged with any Debt or Debts, and any Creditor, or the Wife or Husband of any Creditor, whose Debt is so charged, shall attest the Execution of such Will, such Creditor notwithstanding such Charge shall be admitted a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof.

XVII. And be it further enacted, That no Person shall, on account of his being an Executor of a Will, be incompetent to be admitted a Witness to prove the Execution of such Will, or a Witness to prove the Validity or Invalidity thereof.

XVIII. And be it further enacted, That every Will made by a Man or Woman shall be revoked by his or her Marriage (except a Will made in exercise of a Power of Appointment, when the Real or Per-

Will to be executed like other Wills, and to be valid, although other required Solemnities are not observed.

Soldiers' and Mariners' Wills excepted.

Act not to affect certain Provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to Wills of Petty Officers and Seamen and Marines. Publication not to be requisite.

Will not to be void on account of Incompetency of attesting Witness.

Gifts to an attesting Witness to be void.

Creditor attesting to be admitted a Witness.

Executor to be admitted a Witness.

Will to be revoked by Marriage.

sonal Estate thereby appointed would not in default of such Appointment pass to his or her Heir, Customary Heir, Executor, or Administrator, or the Person entitled as his or her next of Kin, under the Statute of Distributions).

No Will to be revoked by Presumption.

No Will to be revoked but by another Will or Codicil, or by a Writing executed like a Will, or by Destruction.

No Alteration in a Will shall have any Effect unless executed as a Will.

No Will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.

A Devise not to be rendered inoperative by any subsequent Conveyance or Act.

A Will shall be construed to speak from the Death of the Testator.

A Residuary Devise shall include Estates comprised in lapsed and void Devises.

XIX. And be it further enacted, That no Will shall be revoked by any Presumption of an Intention on the Ground of an Alteration in Circumstances.

XX. And be it further enacted, That no Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some Person in his Presence and by his Direction, with the intention of revoking the same.

XXI. And be it further enacted, That no Obliteration, Interlineation, or other Alteration made in any Will after the Execution thereof shall be valid or have any Effect, except so far as the Words or Effect of the Will before such Alteration shall not be apparent, unless such Alteration shall be executed in like Manner as herein-before is required for the Execution of the Will ; but the Will, with such Alteration as Part thereof, shall be deemed to be duly executed if the Signature of the Testator and the Subscription of the Witnesses be made in the Margin or on some other Part of the Will opposite or near to such Alteration, or at the Foot or End of or opposite to a Memorandum referring to such Alteration, and written at the End or some other Part of the Will.

XXII. And be it further enacted, That no Will or Codicil, or any Part thereof, which shall be in any Manner revoked, shall be revived otherwise than by the Re-execution thereof, or by a Codicil executed in manner herein-before required, and showing an Intention to revive the same ; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown.

XXIII. And be it further enacted, That no Conveyance or other Act made or done subsequently to the Execution of a Will of or relating to any Real or Personal Estate therein comprised, except an Act by which such Will shall be revoked as aforesaid, shall prevent the Operation of the Will with respect to such Estate or Interest in such Real or Personal Estate as the Testator shall have Power to dispose of by Will at the Time of his Death.

XXIV. And be it further enacted, That every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXV. And be it further enacted, That, unless a contrary Intention shall appear by the Will, such Real Estate or Interest therein as shall be comprised or intended to be comprised in any Devise in such Will contained, which shall fail or be void by reason of the Death of the Devisee in the Lifetime of the Testator, or by reason of such Devise being contrary to Law or otherwise incapable of taking effect, shall be included in the Residuary Devise (if any) contained in such Will.

XXVI. And be it further enacted, That a Devise of the Land of the Testator, or of the Land of the Testator in any Place or in the Occupation of any Person mentioned in his Will, or otherwise described in a general Manner, and any other general Devise which would describe a Customary, Copyhold, or Leasehold Estate if the Testator had no Freehold Estate which could be described by it, shall be construed to include the Customary, Copyhold, and Leasehold Estates of the Testator, or his Customary, Copyhold, and Leasehold Estates, or any of them, to which such Description shall extend, ~~as the Case may be~~, as well as Freehold Estates, unless a contrary Intention shall appear by the Will.

A general Devise of the Testator's Lands shall include Copyhold and Leasehold as well as Freehold Lands.

XXVII. And be it further enacted, That a general Devise of the Real Estate of the Testator, or of the Real Estate of the Testator in any Place ~~or in the~~ Occupation of any Person mentioned in his Will, or otherwise ~~described in~~ a general Manner, shall be construed to include any Real Estate, or any Real Estate to which such Description shall extend (as the case may be), which he may have Power to appoint in any manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will; and in like Manner a Bequest of the Personal Estate of the Testator, or any Bequest of Personal Property described in a general Manner, shall be construed to include any Personal Estate, or any Personal Estate to which such Description shall extend (as the Case may be), which he may have Power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary intention shall appear by the Will.

A general Gift shall include Estates over which the Testator has a general Power of Appointment.

XXVIII. And be it further enacted, That where any Real Estate shall be devised to any Person without any words of Limitation, such Devise shall be construed to pass the Fee Simple, or other the whole Estate or Interest which the Testator had Power to dispose of by Will in such Real Estate, unless a contrary Intention shall appear by the Will.

A Devise without any Words of Limitation shall be construed to pass the Fee.

XXIX. And be it further enacted, That in any Devise or Bequest of Real or Personal Estate the Words "die without Issue," or "die without leaving Issue," or "have no Issue," or any other Words which may import either a Want or Failure of Issue of any Person in his Lifetime or at the time of his Death, or an indefinite Failure of his Issue, shall be construed to mean a Want or Failure of Issue in the Lifetime, or at the time of the Death of such Person, and not an indefinite Failure of his Issue, unless a contrary Intention shall appear by the Will, by reason of such Person having a Prior Estate Tail, or of a preceding Gift, being (without any Implication arising from such Words), a Limitation of an Estate Tail to such Person or Issue, or otherwise: Provided, that this Act shall not extend to Cases where such Words as aforesaid import if no Issue described in a preceding Gift shall be born, or if there shall be no Issue who shall live to attain the Age or otherwise answer the Description required for obtaining a vested Estate by a preceding Gift to such Issue.

The Words "die without Issue," or "die without leaving Issue," shall be construed to mean die without Issue living at the Death.

XXX. And be it further enacted, that where any Real Estate (other than or not being a Presentation to a Church) shall be devised to any Trustee or Executor, such devise shall be construed to pass the Fee Simple or other the whole Estate or Interest which the Testator had power to dispose of by Will in such Real Estate, unless a definite Term of Years, absolute or determinable, or an Estate of Freehold, shall thereby be given to him expressly or by Implication.

No Devise to Trustees or Executors, except for a Term or a Presentation to a Church, shall pass a Chattel Interest.

Trustees under an unlimited Devise, where the Trust may endure beyond the Life of a Person beneficially entitled for Life, to take the Fee.

Devises of Estates Tail shall not lapse.

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

Act not to extend to Wills made before 1838, nor to Estates *pur autre vie* of Persons who die before 1838.

Act not to extend to Scotland.
Act may be altered this Session.

XXXI. And be it further enacted, That where any Real Estate shall be devised to a Trustee, without any express Limitation of the Estate to be taken by such Trustee, and the beneficial Interest in such Real Estate, or in the surplus Rents and Profits thereof, shall not be given to any Person for Life, or such beneficial Interest shall be given to any Person for Life, but the Purposes of the Trust may continue beyond the Life of such Person, such Devise shall be construed to vest in such Trustee the Fee Simple, or other the whole legal Estate which the Testator had Power to dispose of by Will in such Real Estate, and not an Estate determinable when the Purposes of the Trust shall be satisfied.

XXXII. And be it further enacted, That where any Person to whom any Real Estate shall be devised for an Estate Tail or an Estate in quasi Entail shall die in the Lifetime of the Testator leaving Issue who would be inheritable under such Entail, and any such Issue shall be living at the Time of the Death of the Testator, such Devise shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXXIII. And be it further enacted, That where any Person being a Child or other Issue of the Testator to whom any Real or Personal Estate shall be devised or bequeathed for any Estate or Interest not determinable at or before the Death of such Person shall die in the Lifetime of the Testator leaving Issue, and any such Issue of such Person shall be living at the Time of the Death of the Testator, such Devise or Bequest shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

XXXIV. And be it further enacted, That this Act shall not extend to any Will made before the First Day of *January* One thousand eight hundred and thirty-eight, and that every Will re-executed or republished, or revived by any Codicil, shall for the Purposes of this Act be deemed to have been made at the Time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any Estate *pur autre vie* of any Person who shall die before the First Day of *January*, One thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, That this Act shall not extend to *Scotland*.

XXXVI. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament.

STAMP DUTIES (PROBATES, LEGACY, AND SUCCESSION).

PROBATES OF WILLS. And Letters of Administration, with a Will annexed. (55 Geo. 3, c. 184.)				Administration Without a Will.	
£		£	£ s.	£	s.
Amount to 100	and under	200	2 0	3	0
200	.....	300	5 0	8	0
300	.....	450	8 0	11	0
450	.....	600	11 0	15	0
600	.....	800	15 0	22	0
800	.....	1,000	22 0	30	0
1,000	.....	1,500	30 0	45	0
1,500	.....	2,000	40 0	60	0
2,000	.....	3,000	50 0	75	0
3,000	.....	4,000	60 0	90	0
4,000	.....	5,000	80 0	120	0
5,000	.....	6,000	100 0	150	0
6,000	.....	7,000	120 0	180	0
7,000	.....	8,000	140 0	210	0
8,000	.....	9,000	160 0	240	0
9,000	.....	10,000	180 0	270	0
10,000	.....	12,000	200 0	300	0
12,000	.....	14,000	220 0	330	0
14,000	.....	16,000	250 0	375	0
16,000	.....	18,000	280 0	420	0
18,000	.....	20,000	310 0	465	0
20,000	.....	25,000	350 0	525	0
25,000	.....	30,000	400 0	600	0
30,000	.....	35,000	450 0	675	0
35,000	.....	40,000	525 0	785	0
40,000	.....	45,000	600 0	900	0
45,000	.....	50,000	675 0	1,010	0
50,000	.....	60,000	750 0	1,125	0
60,000	.....	70,000	900 0	1,350	0
70,000	.....	80,000	1,050 0	1,575	0
80,000	.....	90,000	1,200 0	1,800	0
90,000	.....	100,000	1,350 0	2,025	0
100,000	.....	120,000	1,500 0	2,250	0
120,000	.....	140,000	1,800 0	2,700	0
140,000	.....	160,000	2,100 0	3,150	0
160,000	.....	180,000	2,400 0	3,600	0
180,000	.....	200,000	2,700 0	4,050	0
200,000	.....	250,000	3,000 0	4,500	0
250,000	.....	300,000	3,750 0	5,625	0
300,000	.....	350,000	4,500 0	6,750	0
350,000	.....	400,000	5,250 0	7,875	0
400,000	.....	500,000	6,000 0	9,000	0
500,000	.....	600,000	7,500 0	11,250	0
600,000	.....	700,000	9,000 0	13,500	0
700,000	.....	800,000	10,500 0	15,750	0
800,000	.....	900,000	12,000 0	18,000	0
900,000	.....	1,000,000	13,500 0	20,250	0
By 27 & 28 Vict. c. 56, s. 5, Duties on value under £100 repealed.					
Above £1,000,000 (22 & 23 Vict. c. 36).					
For every £100,000, and any fractional part of £100,000				1,500	0
				2,250	0

Intestacy.—Where the estate of an intestate (male or female) does not exceed £100, the widow or children, if residing more than three miles from the registry of the Court of Probate, may apply to the County Court for administration.

Fees of the Registrar of
Probate Court:—

If estate not exceed £20	.. ..	s.	d.
For every £10 or fraction beyond £20	1	0	0

(36 & 37 Vict. c. 52; 38 & 39 Vict. c. 27.)

STAMP DUTIES (PROBATES, LEGACIES, AND SUCCESSION).

TABLES for Calculating the LEGACY AND SUCCESSION DUTIES from £100 to £1 (a).

	£10			£8			£5			£3			£1 pr. ct.				£10			£8			£5			£3			£1 pr. ct.		
£	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	s.	s.	d.	s.	d.	s.	d.	s.	d.	£	s.	d.	s.	s.	d.	
100	10	0	0	6	0	0	5	0	0	3	0	0	1	0	0	13	1	3½	9½	7½	4½	—	—	—	—	—	—	—	—	1½	
50	5	0	0	3	0	0	2	10	0	1	10	0	—	10	0	12	1	2½	8½	7	—	—	—	—	—	—	—	—	1½		
25	2	10	0	1	10	0	1	5	0	—	15	0	—	5	0	11	1	1	7½	6½	—	—	—	—	—	—	—	—	1½		
10	1	0	0	—	12	0	—	10	0	—	6	0	—	2	0	10	1	0	7	6	—	—	—	—	—	—	—	—	1		
5	—	10	0	—	6	0	—	5	0	—	3	0	—	1	0	9	—	10½	6½	5½	—	—	—	—	—	—	—	—	1		
4	—	8	0	—	4	9½	—	4	0	—	2	4½	—	—	9½	8	—	9½	5½	4½	—	—	—	—	—	—	—	—	¾		
3	—	6	0	—	3	7	—	3	0	—	1	9½	—	—	7	7	—	8½	5	4	—	—	—	—	—	—	—	—	¾		
2	—	4	0	—	2	4½	—	2	0	—	1	2½	—	—	4½	6	—	7	4½	3½	—	—	—	—	—	—	—	—	½		
1	—	2	0	—	1	1½	—	1	0	—	—	7	—	—	2½	5	—	6	3½	3	—	—	—	—	—	—	—	—	½		
19s.	—	1	10½	—	1	1½	—	—	11½	—	—	6½	—	—	2½	4	—	4½	2½	2½	—	—	—	—	—	—	—	—	¼		
18	—	1	9½	—	1	0½	—	—	10½	—	—	6½	—	—	2	3	—	3½	2	1½	—	—	—	—	—	—	—	—	¼		
17	—	1	8½	—	1	0	—	—	10	—	—	6	—	—	2	2	—	8½	1½	1	—	—	—	—	—	—	—	—	½		
16	—	1	7	—	—	11½	—	—	9½	—	—	5½	—	—	1½	1	—	1	½	½	—	—	—	—	—	—	—	—	½		
15	—	1	6	—	—	10½	—	—	9	—	—	5½	—	—	1½	6d.	—	½	½	½	—	—	—	—	—	—	—	—	½		
14	—	1	4½	—	—	10	—	—	8½	—	—	5	—	—	1½	3	—	½	—	—	—	—	—	—	—	—	—	—	½		

RATES of LEGACY AND SUCCESSION DUTIES.

(55 Geo. III., c. 184, and 16 & 17 Vict., c. 51.)

Description of the Residuary Legatee, or next of Kin, to be in the following Words of the Act.	On Real or Personal Estate, if the Deceased died after the 5th April, 1865.
To Children of the deceased and their Descendants,— or to the Father or Mother, or any lineal ancestor of the deceased.	£1 per cent.
To Brothers and Sisters of the Deceased, and their Descendants.	3 "
To Brothers and Sisters of the Father or Mother of the deceased, or their Descendants.	5 "
To Brothers and Sisters of a Grandfather or Grandmother of the deceased, and their Descendants.	6 "
To any person in any other degree of collateral consanguinity,—or to Strangers in blood to the deceased.	10 "
The Husband or Wife of any relative pays the same rate of duty as that to which the relative would be liable, 16 & 17 Vict. c. 51, s. 11.	

a. The duties on sums varying between those stated in the first five lines of the Table can, of course, be ascertained by adding the different proportions together, viz., £50, £10, £5, for £65— or by subtraction, as—for £95, £5 from £100.

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THE END.

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